



University of  
**Strathclyde**  
**Glasgow**

# **Reviewing Scotland's Human Rights Bill Consultation**

*Do the proposals align with international human rights obligations?*

Centre for the Study of Human Rights Law

Authors: Katie Hall, Dr Douglas Jack, Professor Alan Miller

September 2023

# Contents

---

<b>Section I: Executive Summary</b> .....	<b>3</b>
1.1. Navigating and Using this Report .....	4
<b>Section II: Introduction</b> .....	<b>8</b>
2.1. Scotland’s Human Rights Journey .....	8
2.1.1. The Incorporation Gap .....	8
2.1.2. Divergent Trajectories .....	9
2.1.3. Devolution.....	10
2.1.4. A Human Rights Bill for Scotland .....	11
2.2. Framework for Analysis.....	11
<b>Section III: Respect, Protect and Fulfil</b> .....	<b>13</b>
3.1. Introduction .....	13
3.2. Making Rights Real .....	14
3.2.1. Models of Incorporation and Implementation .....	14
3.2.2. ICESCR and the Right to a Healthy Environment.....	16
3.2.3. CEDAW, CERD and CRPD.....	19
3.2.4. The Equality Provision.....	21
3.3. Ongoing Reflection and Assessment .....	22
3.4. The Role of Parliament.....	22
3.5. Section Summary .....	23
<b>Section IV: An Effective Framework of Remedies</b> .....	<b>25</b>
4.1. Introduction .....	25
4.2. Framework of Remedies .....	26
4.2.1. Judicial and Non-Judicial.....	26
4.2.2. Timely and Accessible.....	26
4.2.3. Independent and Impartial.....	28
4.2.4. Reparations .....	28
4.2.5. The Right to a Healthy Environment .....	29
4.3. Adjudicating ESCR.....	29
4.3.1. Standards of Review .....	29
4.3.2. Standing .....	30
4.4. Section Summary .....	30
<b>Section V: Monitoring and Reporting</b> .....	<b>32</b>
5.1. Introduction .....	32
5.2. Creating a Framework for Monitoring and Reporting .....	33
5.2.1. A National Mechanism .....	33
5.2.2. Institutional Capacity Building and the Importance of NHRIs .....	34
5.2.3. Domestic Reflection and International Engagement .....	34
5.3. Enabling Parliamentary Involvement and Scrutiny.....	35

5.3.1. Parliamentary Involvement in Monitoring and Reporting .....	35
5.3.2. Pre-legislative Scrutiny .....	35
<b>5.4. Section Summary .....</b>	<b>36</b>
<b>Section VI: Public Participation .....</b>	<b>38</b>
<b>6.1. Introduction .....</b>	<b>38</b>
<b>6.2. Direct Participation: Meaningful and Accessible .....</b>	<b>39</b>
6.2.1. Lived Experience Board .....	40
6.2.2. Consultation.....	41
6.2.3. Implementation .....	45
<b>6.3. Indirect Participation.....</b>	<b>45</b>
6.3.1. Parliamentary Involvement.....	45
6.3.2. Engagement with Constituents.....	46
<b>6.4. Section Summary .....</b>	<b>46</b>
<b>Section VII: Non-Regression .....</b>	<b>48</b>
<b>7.1. Introduction .....</b>	<b>48</b>
<b>7.2. Safeguarding against Regression.....</b>	<b>49</b>
<b>7.3. Two-Tier System.....</b>	<b>49</b>
<b>7.4. Regression at UK Level .....</b>	<b>50</b>
<b>7.5. Section Summary .....</b>	<b>51</b>
<b>Section VIII: Conclusion .....</b>	<b>52</b>
<b>Contacts.....</b>	<b>53</b>

## Section I: Executive Summary

---

In June 2023, the Scottish Government published a Consultation paper on a Human Rights Bill for Scotland, setting forth plans for the incorporation of key international human rights law (IHRL) instruments into Scots law. This Bill, if enacted, would constitute a significant milestone in Scotland's human rights journey, helping Scotland close gaps in domestic rights protection.

This paper considers how the proposals detailed in the Consultation paper align with the international obligations relevant for domestic human rights bills, as identified in a collaborative report published by the Bonavero Institute for Human Rights, *The Making of Bills of Rights: Relevant International Human Rights Law Obligations, An Analysis of the United Kingdom's Obligations* (the Bonavero Report (2023)). The obligations identified in the report are as follows:

1. The obligation to respect, protect and fulfil human rights;
2. The obligation to provide an effective framework of remedies;
3. The obligation to monitor and report on human rights;
4. The obligation to ensure public participation in shaping bills of rights; and
5. The obligation of non-regression in rights protection.

Each of these obligations must be achieved within the limits of devolved competence.

The Consultation paper proposes a tiered approach to obligations as a way of responding to the limitations of devolved competence; whilst a duty to comply will be implemented for ICESCR rights and the right to a healthy environment, a purely procedural duty will apply to CEDAW, CERD and CRPD rights. Although this inevitably limits the scope of a Human Rights Bill for Scotland (HRBS), the choice to prioritise the creation of a passable framework and avoid diluting certain rights to fit devolved limitations is in alignment with the standards of the Bonavero Report (2023). To minimise the impact of such compromise, focus should be placed on ensuring a maximalist approach to incorporation within devolved constraints, requiring stringent consideration of the limits of devolved powers and whether more can be done to extend the duty to comply.

The Consultation paper proposes the adoption of a multi-institutional approach to remedies, centred on streamlining early complaints handling and strengthening advocacy and advice services, with the Scottish Public Services Ombudsman (SPSO) and the Scottish Human Rights Commission (SHRC) acquiring increased powers and responsibilities. Additionally, discussion of the test for reasonableness and updates to standing to better allow for systemic violations to be addressed confront specific issues related to economic, social and cultural rights adjudication. Whilst these are positive steps to delivering a framework of remedies compliant with

the standards of the Bonavero Report (2023), some gaps remain to be filled. Ongoing legal aid reform and efforts to address access to environmental justice are particularly relevant, leaving this a work in progress for a HRBS.

Although the Consultation paper does not propose adopting a formal national mechanism for implementation, reporting and follow-up (NMIRF), identified as best practice by the Bonavero Report (2023), constructive steps are taken towards creating a robust framework for monitoring and reporting. Existing mechanisms will be strengthened, anchored in increased powers to the SHRC and SPSO, whilst the planned Human Rights Scheme will create a reporting duty for Parliament. The proposed creation of pre-legislative statements of compatibility is also a welcome step. With a Human Rights Scheme to be finalised by Parliament, some gaps remain, particularly concerning the extension of a specific reporting duty on CEDAW, CERD and CRPD and the possible adaptation of Section 15 of the UNCRC (Incorporation) Bill to enrich public authority reporting duties.

Public participation is engrained throughout the proposals. Indeed, the consultation itself reflects a commitment to involving rights-holders in the creation of a HRBS, designed to promote accessible and meaningful participation tailored to the specific demographics of Scotland. This notwithstanding, the wording of some questions and the lack of language availability may impede participation, particularly for non-native English or Gaelic speakers.

Finally, the creation of a HRBS is an important step in expanding and solidifying rights protection in Scotland, safeguarding against regression. However, the risk of a two-tier system being created both within the Bill itself, through the stratified extension of duties, and within the UK's system of human rights does raise challenges. Compounding this, the rights-restrictive trajectory of the UK Government has the potential to impact the enjoyment and protection of rights in Scotland. In order to address these challenges, stringent attention must be placed on adopting a maximalist approach to incorporation, minimising the compromises required to remain within devolved competence. Further consideration of the extension of the duty to comply, and the creation of principles for interpretation to aid the navigation of rights-balancing exercises would be particularly constructive in this regard.

Overall, the proposals set forth in the Consultation paper reflect alignment with international obligations to a large extent. With some gaps remaining to be filled, focus must be placed on ensuring a maximalist approach to incorporation within the limits of devolved competence.

## 1.1. Navigating and Using this Report

The following table provides a guide to using this report, highlighting its relevance for the Consultation process, and detailing the framework of analysis used to support future scrutiny as a HRBS evolves. Hyperlinks are embedded for ease of navigation.

**Table 1: Navigating and Using this Report**

Section:	Aim and Relevance to Consultation:	Framework for Analysis:
<p><b>Section II: Introduction</b></p>	<p>This section provides contextual information and sets out the framework for analysis.</p> <p>It will be most useful for those who may be less familiar with the proposals and/or the existing framework for human rights protections in Scotland and the UK.</p>	
<p><b>Section III: Respect, Protect and Fulfil</b></p>	<p>Section III is concerned with how the proposed framework for incorporation will give effect to rights in Scotland.</p> <p>This section is particularly relevant to consultation questions:</p> <ul style="list-style-type: none"> <li>• <b>1-12</b> <ul style="list-style-type: none"> <li>- <i>Model of incorporation</i></li> </ul> </li> <li>• <b>14-21</b> <ul style="list-style-type: none"> <li>- <i>Equality provision</i></li> <li>- <i>Duties under a HRBS</i></li> </ul> </li> <li>• <b>38 and 39</b> <ul style="list-style-type: none"> <li>- <i>Implementation</i></li> </ul> </li> </ul>	<ol style="list-style-type: none"> <li>1. How do proposals <b>set forth the rights for incorporation</b>?               <ol style="list-style-type: none"> <li>a. Will these be domestically relevant, without losing sight of the IHRL context from which they are derived?</li> <li>b. How will these navigate devolutionary constraints, considering in particular the reserved nature of equal opportunities, the intersection with the HRA and limited powers of taxation?</li> </ol> </li> <li>2. How do proposals <b>create capacity for ongoing reflection and the assessment</b> of compliance with international standards?</li> <li>3. How do proposals <b>centre the role of Parliament</b> in advancing and ensuring human rights protection?</li> </ol> <p><b><u>Summary of Findings</u></b></p>
<p><b>Section IV: An Effective Framework of Remedies</b></p>	<p>Section IV focuses on how incorporated rights will be made enforceable.</p> <p>This section is particularly relevant to consultation questions:</p> <ul style="list-style-type: none"> <li>• <b>27-37 and 40</b> <ul style="list-style-type: none"> <li>- <i>Complaints mechanisms</i></li> <li>- <i>Access to justice</i></li> <li>- <i>Remedies</i></li> </ul> </li> </ul>	<ol style="list-style-type: none"> <li>1. Do the proposals include a <b>framework of remedies</b>?               <ol style="list-style-type: none"> <li>a. Does this framework provide for <u>non-judicial and judicial</u> remedies?</li> <li>b. How will <u>timely, accessible</u> remedies be supported by the framework?</li> <li>c. Are all institutions tasked with overseeing remedies <u>independent and impartial</u>?</li> <li>d. How will the framework ensure the availability of <u>reparations</u>?</li> </ol> </li> </ol>

		<p>e. How will the framework navigate specific demands for the <u>right to a healthy environment</u>?</p> <p>2. How does the framework navigate <b>specific questions of ESCR adjudication</b>?</p> <p><b><u>Summary of Findings</u></b></p>
<p><b>Section V: Monitoring and Reporting</b></p>	<p>Section V is concerned with how proposals will enable Scotland to stay informed of, and respond to, the protection of rights in Scotland.</p> <p>This section is particularly relevant to consultation questions:</p> <ul style="list-style-type: none"> <li>• <b>22-26</b> <ul style="list-style-type: none"> <li>- <i>Public authority reporting duties</i></li> </ul> </li> <li>• <b>31, 32 and 40-44.</b> <ul style="list-style-type: none"> <li>- <i>Capacity building in national institutions</i></li> <li>- <i>Parliamentary scrutiny</i></li> </ul> </li> </ul>	<p>1. Does the Consultation paper propose a <b>framework for monitoring and reporting</b>?</p> <ul style="list-style-type: none"> <li>a. Is this done through the <u>creation of an NMIRF</u>?</li> <li>b. Does this involve ensuring <u>institutional capacity</u> to engage, reflecting the value of NHRIs?</li> <li>c. Does this seek to empower both <u>domestic reflection and the fulfilling of international duties</u>?</li> </ul> <p>2. Does the framework proposed <b>create mechanisms to ensure parliamentary involvement</b>, recognising in particular their function as a scrutiny body?</p> <p><b><u>Summary of Findings</u></b></p>
<p><b>Section VI: Public Participation</b></p>	<p>Section VI focuses on how public participation will be embedded in the creation and implementation of a HRBS.</p> <p>This section is particularly relevant to consultation questions:</p> <ul style="list-style-type: none"> <li>• <b>13</b> <ul style="list-style-type: none"> <li>- <i>Participation in a HRBS</i></li> </ul> </li> <li>• <b>39</b> <ul style="list-style-type: none"> <li>- <i>Participatory process for determining</i></li> </ul> </li> </ul>	<p>1. How is <b>direct participation</b> structured?</p> <ul style="list-style-type: none"> <li>a. Do mechanisms create real opportunities for meaningful participation which can influence outcomes and are accessible to all rights-holders?</li> <li>b. Do plans acknowledge potential challenges that may arise in relation to direct public participation, and is there provision for these to be mitigated?</li> </ul> <p>2. How is <b>indirect participation</b> structured?</p>

	<p><i>minimum core obligations</i></p> <ul style="list-style-type: none"> <li>• <b>43</b></li> <li>- <i>Connecting rights-holders to their rights</i></li> </ul>	<ul style="list-style-type: none"> <li>a. What <u>opportunities for scrutiny does Parliament have</u> / will they be afforded in the drafting process?</li> <li>b. Is there <u>support for MSPs to engage with their constituents</u> directly?</li> </ul> <p><b><u>Summary of Findings</u></b></p>
<p><b>Section VII: Non-Regression</b></p>	<p>Section VII focuses on how a HRBS will safeguard against backward steps in the protection and realisation of human rights.</p> <p>This section has overlap with consultation questions:</p> <ul style="list-style-type: none"> <li>• <b>1-3</b></li> <li>- <i>Interpretation</i></li> <li>• <b>5</b></li> <li>- <i>Extension of duties</i></li> <li>• <b>12</b></li> <li>- <i>Signalling commitment to UK-level rights protections</i></li> </ul>	<ul style="list-style-type: none"> <li>1. How does a HRBS <b>propose safeguarding against regression</b>?</li> <li>2. Do the proposals risk contributing to or creating a <b>two-tier system</b> that might give way to regression?</li> <li>3. What might the impact of <b>UK-wide regression</b> be on human rights protection in Scotland, and is there capacity to mitigate this?</li> </ul> <p><b><u>Summary of Findings</u></b></p>
<p><b>Section VIII: Conclusion</b></p>	<p>Section VIII provides a conclusion and summary of findings.</p>	



## Section II: Introduction

---

In June 2023, the Scottish Government launched a public consultation on its plans for a Human Rights Bill for Scotland (HRBS). The Consultation paper outlines a blueprint for the incorporation of key international human rights treaties into Scots law. If enacted, the Bill would constitute a significant milestone in Scotland's human rights journey.

This report aims to assess, from an academic perspective, how the proposals in the Consultation paper align with the international human rights obligations relevant for domestic human rights bills. In so doing it seeks to provide analysis of how a HRBS may elevate both domestic human rights protection and compliance with international human rights law (IHRL) standards in Scotland. It aims to support Consultation responses and provide a framework for further analysis as the Bill progresses.

It will argue that proposals are a promising start, reflecting alignment with international obligations to a large extent. With some gaps remaining to be filled, focus must be placed on ensuring a maximalist approach to incorporation within the limits of devolved competence.

### 2.1. Scotland's Human Rights Journey

#### 2.1.1. The Incorporation Gap

Human rights protection in the UK is multi-layered, emanating from domestic legislation as well as regional and international instruments. While being party to such instruments creates obligations on the UK and devolved governments to respect, protect and fulfil the rights within each treaty, the dualist nature of the UK precipitates a significant gap in domestic accountability and enforceability between unincorporated and incorporated treaties.<sup>1</sup>

The Human Rights Act 1998 (HRA) marked a milestone in domestic human rights protection by incorporating the civil and political rights (CPR) contained within the European Convention on Human Rights (ECHR).<sup>2</sup> The Scotland Act 1998 embedded respect for these 'Convention rights' at the heart of the devolved settlement,

---

<sup>1</sup> Stavert and McGregor state: "it is now accepted that IHRL instruments are of little value without effective implementation"; Jill Stavert & Rebecca McGregor (2018) 'Domestic legislation and international human rights standards: the case of mental health and incapacity', 22 *International Journal of Human Rights* 1, 70. See also Elizabeth Mottorshaw and Rachel Murray (2012) 'National Responses to Human Rights Judgments: The Need for Government Co-ordination and Implementation', 6 *European Human Rights Law Review*, 639

<sup>2</sup> Human Rights Act 1998

requiring the Scottish Government to legislate in a manner compatible with the HRA.<sup>3</sup>

However, many international human rights law (IHRL) standards remain unincorporated. In 2018, Boyle noted that the incorporation gap is acutely felt in Scotland.<sup>4</sup> In particular, the economic, social and cultural rights (ESCR) contained within the International Covenant on Economic, Social and Cultural Rights (ICESCR) have not been incorporated into domestic UK law. Furthermore, while the Equalities Act 2010 provides some protection against discrimination in rights enjoyment, the international instruments that engender rights for specific groups – including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) - also remain unincorporated. This lacuna in rights protection leaves Scotland, and the UK, trailing behind many countries across the globe.<sup>5</sup>

## 2.1.2. Divergent Trajectories

Recent developments in the UK have exacerbated the risk of asymmetry in rights protection. In negotiating the UK's withdrawal from the EU, the Government chose not to retain the EU Charter of Fundamental Rights. The EU Charter introduces rights additional to those within the ECHR, with particular value for the extension of ESCR, and has become more expansive than much of its regional and international source material.<sup>6</sup> Consequently, whilst the UK remains a member of the Council of Europe, and party to the ECHR, the failure to retain the EU Charter post-Brexit leaves the UK stripped of the enriched rights protection it afforded.

Moreover, the attitude and approach of UK Governments in recent years has been identified as signalling a trajectory of rights-restriction. For example, the introduction of legislation restricting freedom of assembly and peaceful protest alongside increasingly hostile approaches to migration and asylum policy has been accompanied with stated reservations about the jurisdiction of the European Court of Human Rights, debate around the repeal of the HRA and discussions on withdrawing from the ECHR entirely.<sup>7</sup>

Holyrood's approach sets Scotland on a divergent trajectory from the rights-restrictive approach of Westminster. In response to the Brexit referendum, then First Minister, Nicola Sturgeon MSP, created an independent Advisory Group on Human

---

<sup>3</sup> Scotland Act 1998

<sup>4</sup> See Katie Boyle (2018), '*Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*', Scottish Human Rights Commission. Accessed - [https://www.scottishhumanrights.com/media/1809/models\\_of\\_incorporation\\_escr\\_vfinal\\_nov18.pdf](https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf) [06/09/2023]

<sup>5</sup> *ibid*

<sup>6</sup> Chris McCorkindale (2018), 'Brexit and Human Rights', 22 *Edinburgh L Rev* 126

<sup>7</sup> See Frances Webber (2021), 'Britain's authoritarian turn', 62 *Race & Class* 4, 106. The Illegal Migration Act 2023 is a further development in this – see discussion in section 7.4.

Rights Leadership, tasked with exploring how the UK's withdrawal from the EU would impact on human rights. Following the Advisory Group's report at the end of 2018, a National Taskforce on Human Rights Leadership was created to drive forward the Advisory Group's recommendations. In March 2021, the Taskforce identified a need to create a Scottish framework for human rights by incorporating a broader range of international treaties into Scots law, publishing 30 recommendations to support the implementation of these proposals.<sup>8</sup>

The Scottish Government accepted the Taskforce recommendations and engaged with members of the public, civil society organisations, experts, and public authority decision-makers to consider how best to advance the Taskforce proposals. The publication of the Consultation paper is the culmination of this process.

### 2.1.3. Devolution

Devolution has significant bearing on the powers of the Scottish Government to legislate, and thus on the creation of human rights legislation in Scotland. Beyond baking respect for the HRA into the devolution settlement,<sup>9</sup> Section 29(2)(b) of the Scotland Act prevents the Scottish Parliament from passing laws on reserved matters, including employment, immigration and asylum, data protection and, to a large extent, equal opportunities. The majority of taxes are also reserved. Any Act of the Scottish Parliament that is passed out with these limits of competence is invalid, and liable to be struck down by the Courts.<sup>10</sup>

Meanwhile, s.28(7) of the Scotland Act emphasises the UK Parliament's power to make laws in devolved areas. This formed the basis of the UK Supreme Court ruling to overturn a Scottish Bill that sought to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law. This ruling has deep significance for our understanding of devolved competence and the challenges that a HRBS might face. In particular, the broad reading of s.28(7) of the Scotland Act marked a departure from the previous understanding of this section as a largely emblematic assertion of Westminster's sovereignty, to one that has the power to extensively curtail the legislative freedom of the Scottish Parliament.<sup>11</sup> O'Neill's assertion that '*power devolved is power retained*' rings truer than ever, with the willingness of the UK Government to narrowly impose the limits of devolved freedom strikingly evident.<sup>12</sup> This was echoed in the vetoing of the Gender Recognition Reform (Scotland) Act in April 2023.<sup>13</sup>

---

<sup>8</sup> Scottish Government (2023), '*A Human Rights Bill for Scotland: Consultation*', Scottish Government. Accessed - <https://www.law.ox.ac.uk/sites/default/files/2023-01/Bill%20of%20Rights%20FINAL.pdf> [06/09/2023]. Hereafter referenced as 'Consultation paper'. See Part 1, p5-9, for an overview of Scotland's human rights journey.

<sup>9</sup> Scotland Act 1998, s.29(2)(d)

<sup>10</sup> *ibid*

<sup>11</sup> Mark Elliot and Nicholas Kilford (2022), 'The Supreme Court's Defence of Unqualified Lawmaking Power: Parliamentary Sovereignty, Devolution and the Scotland Act 1998'. 81 *Cambridge Law Journal* 1, 4

<sup>12</sup> Aidan O'Neill (2006), "'Stands Scotland Where It Did?": Devolution, Human Rights and the Scottish Constitution Seven Years on' 57 *N Ir Legal Q*, 102, p104

<sup>13</sup> The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023

## 2.1.4. A Human Rights Bill for Scotland

The Consultation paper outlines proposals for a HRBS, involving the incorporation of key international instruments and standards into Scots law. Largely aligned with the recommendations of the Taskforce, the Consultation paper proposes to incorporate:

1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>14</sup>
2. The Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>15</sup>
3. The Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>16</sup>
4. The Convention on the Rights of Persons with Disabilities (CRPD)<sup>17</sup>
5. The right to a healthy environment<sup>18</sup>

The process of incorporation requires translating international norms in a way that is practicable in the national context, without diluting the essence of the original right. As a result, there is no ‘one size fits all’ approach; instead, incorporation must allow international norms to thrive within the domestic legal regime. For Scotland, the most pressing obstacle to navigate is the limit of devolved competence. The UK Supreme Court ruling on the UNCRC (Incorporation) Bill is an acute reminder that the task at hand must be achieved with close attention to devolved competence and, with the reconsideration process ongoing, has bearing on the current form of proposals. Some areas of the Consultation paper leave space for further refinement as this reconsideration process unfolds.

## 2.2. Framework for Analysis

In 2023, the Bonavero Institute of Human Rights, in collaboration with the Bingham Centre for the Rule of Law and the Centre for the Study of Human Rights Law at the University of Strathclyde, published a report analysing and synthesising the international obligations relevant to the creation and amendment of domestic human rights bills.<sup>19</sup> The Bonavero Report (2023) identified five key obligations, derived

---

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

<sup>15</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD)

<sup>16</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

<sup>17</sup> Convention on the Rights of Persons with Disabilities (adopted 24 January 2007) A/RES/61/106 (CRPD)

<sup>18</sup> The human right to a clean, healthy and sustainable environment, HRC Resolution 48/13 (18 October 2021); see also UNGA Res 76/300 (1 August 2022).

<sup>19</sup> Murray Hunt, Alan Miller, Catherine O'Regan and Emma Rowland (2023), *The Making of Bills of Rights: Relevant International Human Rights Law Obligations, An Analysis of the United Kingdom's Obligations*, The Bonavero Institute of Human Rights. Accessed - <https://www.law.ox.ac.uk/sites/default/files/2023-01/Bill%20of%20Rights%20FINAL.pdf> [06/09/2023] Hereafter, referenced as ‘Bonavero Report (2023)’.

from IHRL, that proposals for domestic human rights reform should comply with. These obligations are:

1. The obligation to respect, protect and fulfil human rights;
2. The obligation to provide an effective framework of remedies;
3. The obligation to monitor and report on human rights;
4. The obligation to ensure public participation in shaping bills of rights; and
5. The obligation of non-regression in rights protection.

This paper will review how the Scottish Government's proposals comply with these five obligations. Each will be considered in order, with a brief discussion of the relevant obligation before identifying context-specific questions to ask of the proposals and addressing these in turn. This enables analysis to reflect that, with no *'one-size-fits-all'* approach to incorporation, there is similarly no one right way of fulfilling each obligation. For Scotland, the ability of proposals to navigate the limits of devolved competence to give practicable effect to international rights whilst ensuring that the essence of these rights is not diluted is essential.

The final section will provide an overall conclusion and summary of findings, arguing that, on the whole, proposals reflect keenly the standards set out in the Bonavero Report (2023). With some remaining gaps to be filled, a key point of concern is that rigorous attention is paid to ensure that a HRBS reflects a maximalist approach to incorporation; going as far as possible to fulfil the Scottish Government's human rights obligations whilst remaining within the limits of devolved competence.

## Section III: Respect, Protect and Fulfil

---

This section draws on Part 3.1 of the Bonavero Report (2023) and is particularly relevant to Consultation questions 1-12, 14-21, 38 and 39.

### 3.1. Introduction

Lying at the heart of IHRL obligations, the duty to respect, protect and fulfil human rights is the most general and overarching of those discussed in the Bonavero Report (2023). At its essence, respect, protect and fulfil encapsulates the tiers of obligations that duty-bearers have towards rights-holders. The duty to 'respect' is understood primarily as a negative duty on public authorities to not violate individual rights; the duty to 'protect' is considered a positive duty to prevent the violation of rights by non-state actors; and the duty to 'fulfil' requires the adoption of a framework – including legislative and administrative measures – to ensure the full realisation of rights.<sup>20</sup>

In achieving the obligations to respect, protect and fulfil through incorporation, the need for rights to be translated so as to be both relevant and effective in the domestic context whilst remaining aligned with their normative source in international law is central.<sup>21</sup> The Bonavero Report (2023) highlights the necessity of continual assessment and reflection to ensure that domestic legislation remains responsive and aligned with IHRL standards, noting that national human rights bills can provide a mechanism for such a process.<sup>22</sup> The Bonavero Report (2023) also emphasises the importance of parliamentary involvement in offering scrutiny to proposed legislation, tabling amendments and updates, and ensuring the effective implementation of laws and policies to protect human rights.<sup>23</sup>

This section is therefore concerned with how the proposed framework for incorporation will give effect to specific rights in the domestic context. Mindful of the significance of parliamentary involvement and ongoing reflection for best practice, this section will consider:

1. How do proposals set forth the rights for incorporation?
  - a. Will these be domestically relevant, without losing sight of the IHRL context from which they are derived?
  - b. How will these navigate devolutionary constraints, considering in particular the reserved nature of equal opportunities, the intersection with the HRA and limited powers of taxation?

---

<sup>20</sup> Bonavero Report (2023) (n19) p33-46

<sup>21</sup> Boyle (n4) p10

<sup>22</sup> Bonavero Report (2023) (n19) p44

<sup>23</sup> *ibid*

2. How do proposals create capacity for ongoing reflection and the assessment of compliance with international standards?
3. How do proposals centre the role of Parliament in advancing and ensuring human rights protection?

## 3.2. Making Rights Real

Scotland's approach to incorporation and implementation will have significant bearing on how the obligation to respect, protect and fulfil human rights is realised. The obligation to fulfil also requires the creation of conditions which allow rights-holders to access their rights, hence the provision of remedies, discussed in Section III, is an overlapping component.<sup>24</sup>

As identified, effective incorporation requires the translating of IHRL into rights of domestic relevance, without *'diluting'* or *'undermining'* their essence.<sup>25</sup> These rights must then be operationalised, through a process of implementation and the creation of duties.<sup>26</sup> At the outset of the Consultation paper, the Scottish Government clearly stipulates their intention for a HRBS to "provide a clear and accessible human rights framework which makes a real difference to the people of Scotland", whilst maintaining firm alignment to the IHRL system and prioritising functionality within the limits of devolution.<sup>27</sup> Whether the proposed model for incorporation and implementation provide a strong basis for this aim to be delivered will be the focus of this section.

### 3.2.1. Models of Incorporation and Implementation

#### *A. Incorporation*

The Consultation paper proposes a model of direct incorporation, whereby the text of original rights is reproduced in the drafting of a HRBS. Despite the overlap between the treaties planned for incorporation, this model is favoured over alternative strategies for its clarity and ability to ensure alignment with IHRL standards.<sup>28</sup> Boyle's comparative study, focused on the Scottish context, found direct incorporation to be the strongest means to achieve domestic implementation of ESCR.<sup>29</sup> With ESCR centre stage in proposals, this evidences the selected model of incorporation as the best possible approach.

---

<sup>24</sup> Bonavero Report (2023) (n19) p38

<sup>25</sup> Boyle (n4) p10

<sup>26</sup> See Boyle (n4) and Stavert and McGregor (n1)

<sup>27</sup> Consultation paper (n8) p16

<sup>28</sup> Ibid, p17

<sup>29</sup> Boyle (n4) p10

In navigating the limits of devolved competence, the Consultation paper proposes that a HRBS will exclude rights within the treaties that refer to reserved matters. This will be done as narrowly as possible; an approach which mirrors that taken in the UNCRC (Incorporation) Bill. The ruling that overturned this Bill centred on issues with procedural sections, rather than the normative content, and thus there is no strong precedent for a different approach to be adopted.<sup>30</sup>

On the contrary, the Consultation paper adopts a cautious approach to the limits of devolution. In choosing not to adopt the Taskforce recommendation to restate the rights of the HRA, the Government expresses concerns that this runs the risk of a legal challenge.<sup>31</sup> Similar reasoning underpins the choice not to include the UN Convention Against Torture (UNCAT), which is considered to have too close an overlap with reserved matters and the rights contained within the HRA.<sup>32</sup> Whilst this may raise questions in regard to the limitation of scope, the choice not to squeeze or dilute contentious rights into devolved competence and instead prioritise an effective and passable framework is hard to criticise, either from the perspective of domestic practicability or alignment with international standards.

Focus is thus best directed at whether plans reflect a maximalist approach to incorporation within devolved competence. This is a challenging question to which an answer cannot be fully expected at this stage, especially with the ongoing reconsideration process of the UNCRC (Incorporation) Bill likely to shed light on the practical limits of devolution in relation to incorporation. As such, the commitment to a maximalist approach, firmly engrained throughout the Consultation paper, is a welcome one. It is essential that Consultation responses as well as the outcome of the UNCRC (Incorporation) Bill reconsideration process are thoroughly examined to ensure that this aim is reflected in a HRBS.

## *B. Implementation*

In discussing plans for implementation, the Consultation paper stipulates that duties will apply to bodies carrying out devolved public functions.<sup>33</sup> Extending duties to bodies carrying out reserved public functions would fall beyond devolved competence, again reflecting the commitment to a maximalist approach within devolutionary constraints. Mirroring s.6 of the HRA, the emphasis on ‘function’ places duties on private organisations exercising public functions, ensuring that human rights are embedded in all aspects of public facing decision-making in Scotland.

---

<sup>30</sup> See Elliot & Kilford (n11)

<sup>31</sup> Consultation paper (n8) p23; National Taskforce for Human Rights Leadership (2021), *Report*, Scottish Government. Accessed - <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2021/03/national-taskforce-human-rights-leadership-report/documents/national-taskforce-human-rights-leadership-report/national-taskforce-human-rights-leadership-report/govscot%3Adocument/national-taskforce-human-rights-leadership-report.pdf> [06/09/2023] rec1(a), p28.

<sup>32</sup> Consultation paper (n8) p23-24

<sup>33</sup> *Ibid*, p28



For ICESCR rights and the Right to a Healthy Environment, the planned introduction of a HRBS will incur an initial procedural duty to ensure that decisions are made in accordance with these standards. This precedes a later duty to comply, which will come into force after due time for preparation by public authorities. For CEDAW, CERD and CRPD rights, the Consultation paper proposes that the duty will remain purely procedural, supported with an equality provision to address non-discrimination.<sup>34</sup> These three treaties are referred to as the 'Equality Treaties' by the Consultation paper. Although this description is arguably reductionist, the paper details the rights contained in each instrument, providing essential context, and proposes that each treaty is reproduced in a HRBS.<sup>35</sup> As such, this shorthand is not intended to obscure recognition of each of the 'Equality Treaties' as complex instruments in their own right. As a means of navigating the reserved nature of equal opportunities, this tiered approach to implementation is again a symptom of devolution. The potential limitations of this will be engaged with in the following sections.

### 3.2.2. ICESCR and the Right to a Healthy Environment

#### *A. Defining the Rights*

##### Minimum Core Obligations and Interpretation

The obligation to progressively realise ESCR using maximum available resources is a key duty of the ICESCR. This obligation recognises that ESCR often require strategic policy choice, resource allocation and time to achieve. Progressive realisation requires a minimum level of protection for each right, which can then be continuously and deliberately built upon.<sup>36</sup> These minimum levels of protection are also essential for the prevention and identification of violations. International bodies have emphasised that defining these minimum levels is subject to a wide margin of appreciation for states, acknowledging that states have varying needs and policy priorities.<sup>37</sup>

The creation of Minimum Core Obligations (MCOs) for a HRBS will provide clearly defined minimum levels of protection for the incorporated rights. In setting forth a process for determining MCOs, the Consultation paper commits to centring public participation and wide stakeholder engagement.<sup>38</sup> Enabling the determination of MCOs targeted to the specific needs of key communities within Scotland yet mindful of the capacity of duty-bearers is a welcome commitment. Further elaboration on

---

<sup>34</sup> Consultation paper (n8) p18

<sup>35</sup> See Consultation paper (n8) p11-12 for detail on the distinct instruments, and Consultation paper (n8) p18 for the proposal to reproduce all four treaties.

<sup>36</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant)*, 14 December 1990, E/1991/23. Accessed - <https://www.refworld.org/docid/4538838e10.html> [06/09/2023]

<sup>37</sup> *ibid*

<sup>38</sup> Consultation paper (n8) p48

how this process will take shape would allow a fuller future assessment of how it will support the obligation to respect, protect and fulfil human rights.

The proposals emphasise the value of dignity as a key element in the creation of a multi-institutional culture of human rights, including for the determination of MCOs. The concept of dignity and 'dignity talk' has been praised by scholars as a means for supporting accessibility and improving popular understanding of human rights, rectifying the divorce between legal jargon, complex legislation and 'real life'.<sup>39</sup> Crucially, this can have significant impact on the ability of rights-holders to understand when their rights are not being upheld, with Webster highlighting that the absence of dignity is often easier to identify than incompatibility with the text of legal instruments.<sup>40</sup> Harnessing dignity may thus enhance public involvement in defining MCOs, creating a tangible baseline with which individual rights-holders can more easily engage.

Additionally, the Consultation paper proposes to include an interpretive clause which also centres dignity, with its definition derived from key international sources. Divergence in General Comments issued by different UN treaty bodies on the meaning of dignity is identified as a possible limitation in the Consultation paper, however Webster questions whether this is a barrier – highlighting that flexibility in understandings may instead create space to connect and account for myriad experiences.<sup>41</sup> Embedding dignity in an interpretive approach is therefore a welcome step for ensuring accessibility and consistency throughout the legal framework, whilst reaffirming alignment with the IHRL system.

### Right to a Healthy Environment

The right to a healthy environment is an emerging standard in the body of IHRL. In its plans for incorporation, the Consultation paper considers a compendium of relevant sources, detailing both substantive and procedural elements of this right in creating a guiding framework concurrent with the IHRL system. It details six distinctive but interdependent substantive features – clean air, safe climate, safe and sufficient water, non-toxic environments and healthy biodiversity and ecosystems – which is a welcome step in ensuring alignment with the Aarhus Convention, a key instrument in this area.<sup>42</sup>

The Consultation paper also discusses how components of the right to a healthy environment interact with ESCR. In particular, plans consider the right to adequate food, a component of the right to a healthy environment in IHRL, but argue that this is best protected in a HRBS under the right to an adequate standard of living, an

---

<sup>39</sup> See Elaine Webster (2022), 'I Know it When I See it': Can talking about 'dignity' support the growth of a human rights culture?', University of Strathclyde. Accessed - [https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/cshrl/Can\\_Talking\\_about\\_'Dignity'\\_Support\\_the\\_Growth\\_of\\_Human\\_Rights\\_Culture'.pdf](https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/cshrl/Can_Talking_about_'Dignity'_Support_the_Growth_of_Human_Rights_Culture'.pdf) [06/09/2023]; and National Taskforce for Human Rights (n25).

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

<sup>42</sup> Consultation paper (n8) p21

ICESCR right.<sup>43</sup> Similarly, whilst the Consultation paper proposes understanding the right to safe and sufficient water as a substantive element of the right to a healthy environment, it does not make explicit reference to the right to adequate sanitation within this, a component recognised by the Special Rapporteur in 2019.<sup>44</sup>

Although enabling a distinction between the interrelated components of rights may inform priorities for progressive realisation whilst providing scope for nuanced rights-balancing exercises, it is vital that the distinct essence of each component is recognised and safeguarded, reflecting the interdependence and interrelation of all human rights. There would be benefit in full and careful consideration of Consultation responses in this regard to ensure that a HRBS provides adequate protection for these rights and their interrelated components.

### *B. Achieving Progressive Realisation*

Once defined, MCOs will inform the duty to comply. Clearly stipulating that MCOs are a ‘floor’ and not a ‘ceiling’ of rights protection, the duty to comply will require the progressive realisation of ESCR and the right to a healthy environment, vital for fostering an active approach to respecting, protecting and fulfilling these rights.<sup>45</sup> Carefully defined MCOs will support an effective balance between rights protection and the capacity of duty-bearers, in line with the need to dedicate ‘maximum available resources’ to achieve progressive realisation.<sup>46</sup>

The ‘sunrise’ clause, in essence, recognises the need for a period of transition to allow time for public authorities to prepare, supporting compliance and buy-in of duty-bearers. Although this is integral to the success of a HRBS, it is important that unnecessary delays are avoided. The process for MCO determination will take place within this period, and as such impacts the timeline for the implementation of the duty to comply. With this process under ongoing consideration, there is scope to ensure that preparatory work is maximised to expedite the move to a duty to comply as far as possible whilst equally ensuring a sufficient preparatory period for public authorities. Further clarity on a proposed timeline would be for the benefit of all stakeholders.

Furthermore, limited powers of taxation under devolution may constrain policy decisions and resource allocation, proving problematic for progressive realisation in practice. Features of the proposal that seek to lay substantive groundwork in early stages may help to identify and prepare for challenges in advance. This summer, an Implementation Working Group will work towards guidance to aid implementation,<sup>47</sup>

---

<sup>43</sup> Ibid, p22

<sup>44</sup> See Human Rights Council (2019), *‘Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Report of the Special Rapporteur’*. Accessed - <https://digitallibrary.un.org/record/1663859?ln=en> [08/09/2023]

<sup>45</sup> Consultation paper (n8) p31

<sup>46</sup> ibid

<sup>47</sup> Ibid, p51

whilst the Executive Board involved in the drafting of both the Consultation Paper and the Bill itself is actively engaging with duty-bearers to ensure capacity for implementation.<sup>48</sup>

The creation of a Human Rights Scheme will be a key tool for supporting progressive realisation. This includes a proposed duty to report on the implementation of the existing Scottish National Action Plan for Human Rights (SNAP 2). SNAP 2 identifies priorities in terms of expanded rights-protection and the creation of shared medium and long-term aims, and the integration of this within a Human Rights Scheme is likely to be an invaluable tool for supporting progressive realisation.<sup>49</sup> SNAP 2 also includes duties in regard to budgetary reporting, recognising that there is often a disconnect between human rights policy aims and financial decision-making.<sup>50</sup> Such a duty will be of great importance in identifying and overcoming challenges raised by constrained powers of taxation. In this way, a Human Rights Scheme will allow for informed reflection on how resources are dedicated to achieve progressive realisation, identifying areas where further work is needed and enabling a multi-institutional approach to closing such gaps.

With the duty to comply, and thus the obligation of progressive realisation, extending to the right to a healthy environment, an interesting, and thorny, question is perhaps raised concerning the role of private entities, considering the impact of private businesses and transnational corporations on our environment.<sup>51</sup> By emphasising the exercise of devolved public functions in the definition of public authorities, it follows that private sector organisations may be duty-bound under a HRBS in so far as they exercise such function.<sup>52</sup> It is unlikely that this definition encapsulates all private activity that is harmful to the planet. However, the role of businesses in human rights is a challenge facing the international system at large, and not an isolated one that a HRBS is able to answer.

### 3.2.3. CEDAW, CERD and CRPD

The Consultation paper takes a different approach to the duties extended to CEDAW, CERD and CRPD. With equal opportunities a predominantly reserved matter, this is an area in which the limits of devolution are keenly apparent. Although the Scottish Parliament has the power to promote equal opportunities and regulate them in relation to devolved functions, the Parliament cannot modify the UK-wide Equalities Act 2010, nor pass legislation that may infringe on the protection of equal opportunities in relation to reserved matters.<sup>53</sup> Indeed, it was on this basis that the

---

<sup>48</sup> Ibid, p43

<sup>49</sup> Scottish National Action Plan for Human Rights (2023), 'SNAP 2', Accessed - <https://www.snaprights.info/wp-content/uploads/2023/03/SNAP-2-March-2023-FINAL-PDF.pdf> [06/09/2023]

<sup>50</sup> Ibid, p25

<sup>51</sup> See, for e.g., Human Rights Council (n44) p4

<sup>52</sup> See discussion in section 3.2.1.B above.

<sup>53</sup> Scotland Act 1998, s.28(7)

UK Government vetoed the Gender Recognition Reform (Scotland) Bill in April this year.<sup>54</sup>

In navigating these constraints, the Consultation paper does not propose a duty to comply for these treaties. Instead, duties will be purely procedural: the standards within CEDAW, CERD and CRPD will have to be considered in both general decision-making and in the delivery of ESCR and the right to a healthy environment, but with no substantive obligations towards the realisation of their specific rights.<sup>55</sup> Little detail is given as to how this procedural duty will operate.

Although the Consultation Paper describes this as a ‘significant step-change’,<sup>56</sup> this is an undoubtable limitation on the capacity of a HRBS to respect, protect and fulfil the rights in the Equalities Treaties, risking a two-tiered system of rights-protection within the Bill. The paper itself recognises that this constrains the ‘transformative impact’ of a HRBS.<sup>57</sup> Again, this reflects the Scottish Government’s choice to prioritise the development of a passable Bill, rather than pushing the boundaries of devolved competence and risking legal challenge. For the reasons set out above, this is hard to criticise. Instead, focus should be placed on whether this reflects a maximal approach to incorporation, going as far as is possible within devolved competence.

The desire to create a human rights culture interwoven in the fabric of Scottish society is a central ambition throughout the Consultation paper, supported by an emphasis on multi-institutional involvement, public participation and a commitment to clarity and accessibility for both duty-bearers and rights-holders.<sup>58</sup> Embedding the standards of the Equality Treaties in decision making processes may have a reciprocal effect; facilitating the creation of a strong human rights culture which in turn supports an enhanced degree of scrutiny to this procedural duty.

Evidence-based decision making is vital to the effective discharge of this procedural duty, and indeed to the progressive realisation of all rights within a HRBS.<sup>59</sup> Public participation, discussed in more depth in Section VI, has been and continues to be an important component of Scotland’s human rights journey. The Lived Experience Board (LEB) has informed the drafting of the Consultation Paper, and proposals confirm a desire to maintain and refresh this interaction for future stages, whilst a commitment is made to ingrain public participation in a Human Rights Scheme and relevant sections of the Bill itself.<sup>60</sup> These mechanisms support the representation of key groups - including those whose rights are most at risk, those often unheard in decision-making processes and those with experience of rights-violations -

---

<sup>54</sup> The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023

<sup>55</sup> Consultation paper (n8) p19

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid, p1

<sup>59</sup> Boyle (n4) p8

<sup>60</sup> Consultation paper (n8) p9-10

throughout the consultation and drafting processes and in the operationalisation of a bill itself, facilitating evidence-based decision making at all stages.

Notwithstanding mechanisms that may support the effective discharge of a procedural duty, it remains undeniable that this approach will prevent these treaties from having ‘teeth’. Although extending a duty to comply to all rights within each of the treaties slated for incorporation is undoubtedly the ideal, this is not regarded as possible within devolved competence. The next-best approach is considered as curtailing the duty to comply only where absolutely necessary, i.e., where rights refer to reserved matters or overlap with reserved legislation.

Some rights within CEDAW, CERD and CRPD do not exist in other international instruments, including the ICESCR, and thus would be entirely excluded from a HRBS under current proposals. A number of these rights do overlap with devolved matters, including Article 19 CRPD, the right to live independently and be included in the community. The Consultation paper acknowledges this, highlighting that some rights in CEDAW, CERD and CRPD may have “stand-alone significance”.<sup>61</sup> The Consultation seeks views on which rights this may apply to and how this may be navigated.<sup>62</sup> Demonstrating awareness and an active effort to minimise limitations, this is a welcome step. However, how realistic it is that this, as a consultation question, may precipitate answers that navigate the complexity of devolved competence is doubtful.<sup>63</sup> It is essential that the Government commits to rigorous further consideration, liaising with legal experts and facilitating supported engagement with rights-holders, particularly from the groups affected.

### 3.2.4. The Equality Provision

The Consultation paper proposes including an Equality Provision, intending to navigate non-discrimination within devolved competence by complimenting the procedural duty on the Equalities Treaties to ensure equal access of all to all rights within a HRBS.<sup>64</sup>

The proposals consider modelling this on Art.2 ICESCR or Art.14 ECHR, which specifically denote the right to non-discrimination in the enjoyment of human rights. Both articles include “other status” and so are not prescriptive on protected characteristics. Reaffirming commitment to a close alignment with the IHRL system, the Consultation paper considers whether a HRBS could go further. In particular, the plans discuss explicitly including LGBTI people and older people, who currently fall within the ‘social group’ category of non-discrimination provisions in IHRL standards.<sup>65</sup> Significantly, neither group is at present the subject of a dedicated IHRL instrument. Inclusion within an equality provision in a HRBS may therefore encourage the specific needs of these communities to be accounted for in decision-

---

<sup>61</sup> Consultation paper (n8) p19

<sup>62</sup> See question 5, *ibid.*

<sup>63</sup> See later discussion in section 6.2.2.B.

<sup>64</sup> Consultation paper (n8) p9

<sup>65</sup> *Ibid.*, p27

making. Not only could this enhance rights-protection, but it would see Scotland demonstrate true human rights leadership.

The procedural duty on the Equalities Treaties and the planned equality provision, are core components of how proposals will achieve the obligation to respect, protect and fulfil human rights. These proposals will ensure that the duty to comply with ESCR and the right to a healthy environment is implemented with particular attention paid to the needs of specific groups within the wider aim of non-discrimination - supporting, and in turn supported by, an engrained culture of human rights. This approach will then be mirrored across all aspects of public decision making.

Despite its importance, little detail exists on how an equality provision will function in practice. Instead, a number of questions are raised, and reference is made to plans being under continued consideration.<sup>66</sup> The outcome of the UNCRC (Incorporation) Bill reconsideration process may have considerable sway on the final form of this provision, considering how closely it sails to the limits of devolved competence, and leaving scope to account for this is not only understandable, but hopeful; suggesting a commitment to a maximalist approach in the creation of this provision.

### 3.3. Ongoing Reflection and Assessment

The Bonavero Report (2023) identifies the importance of mechanisms being created to allow ongoing reflection on how the framework of domestic rights-protection remains aligned with IHRL standards, and capacity for updates where needed.

The plans for a HRBS set forth key mechanisms for monitoring and reporting, which overlaps closely with this requirement and will be discussed in Section V. However, in the specific context of the obligation to respect, protect and fulfil human rights, the Consultation Paper seeks to build on the public involvement in the initial determination of MCOs to create a repeatable participatory process to ensure reflection and adaptation, supported by the retained involvement of the LEB.<sup>67</sup> As such, there is a clear acknowledgement of the need for ongoing reflection and assessment to ensure that the rights within a HRBS remain both domestically relevant and internationally aligned. The involvement of public participation within this is particularly welcome.

### 3.4. The Role of Parliament

Parliamentary involvement is emphasised as a vital component of ensuring the obligation to respect, protect and fulfil human rights in the Bonavero Report (2023), and is very much present within the Scottish proposals.

---

<sup>66</sup> Consultation paper (n8) p25-26

<sup>67</sup> Ibid, p33

The creation of a multi-institutional human rights culture centres the role of Parliament, as do key mechanisms supporting implementation - the proposed Human Rights Scheme and its inclusion of SNAP 2. Ministerial involvement in the identification of priorities for rights protection as well as the establishment of medium and long-term goals ensures parliamentary involvement in the process of progressive realisation, with obligations relating to budgetary reporting providing a further avenue for parliamentary scrutiny, particularly in respect to the allocation of resources and work towards progressive realisation. The role of Parliament overlaps closely with mechanisms for monitoring and reporting, and will be discussed in more depth in Section V.

### 3.5. Section Summary

This section first focused on the proposed model for incorporation and implementation.

- Throughout the Consultation Paper, there is a clear emphasis on domestic practicability in light of devolved competence, and on alignment with the IHRL system, keenly reflecting the standards of the Bonavero Report (2023).
- The proposal not to extend a duty to comply to CEDAW, CERD and CRPD rights in order to navigate devolved competence inevitably curtails the scope of a HRBS. However, the choice to prioritise the creation of a passable framework and avoid diluting certain rights to fit devolved competence is in alignment with the standards identified in the Bonavero Report (2023). Focus should instead turn to ensuring a maximalist approach is adopted in the drafting of a HRBS, with careful consideration of any rights that might be lost.
- In enriching the enjoyment of rights in the national context, the ‘sunrise’ clause creates essential time for duty-bearers to prepare and ‘buy-in’ to a HRBS in advance of a duty to comply, supporting successful implementation and progressive realisation. This is bolstered by the multi-institutional approach to determining MCOs, and the centrality of dignity. Such proposals will support duty-bearers compliance, consistency in interpretation and ownership amongst rights-holders. Further detail on timescales for this process would be of benefit.

Secondly, this section considered whether proposals created capacity for ongoing reflection and assessment of compliance with IHRL standards.

- There is a clear commitment to this throughout the Consultation Paper. For example, plans to build upon the initial determination of MCOs to create a repeatable participatory process, supported by the retained involvement of the Lived Experience Board, creates capacity for ongoing reflection, assessment and adaptation.



Finally, question three asked whether proposals centred the role of Parliament in advancing and ensuring human rights protection.

- The importance of parliamentary scrutiny is embedded throughout the Consultation paper, and proposed mechanisms for parliamentary involvement – namely, the Human Rights Scheme - will support accountability in rights protection and realisation, whilst enabling challenges raised by devolutionary constraints to be identified and overcome.

## Section IV: An Effective Framework of Remedies

---

This section draws on Part 3.2 of the Bonavero Report (2023) and is particularly relevant to Consultation questions 27-37 and 40.

### 4.1. Introduction

Operationalising programmatic international norms into domestically justiciable rights through incorporation requires the provision of effective remedies; indeed, Boyle highlights that incorporation is incomplete if the rights included are not coupled with access to an effective remedy.<sup>68</sup> Creating the conditions needed for individuals to access and claim their rights is an integral component of the obligation to fulfil, and thus this section overlaps with the previous. Furthermore, with the right to an effective remedy enshrined in international instruments, this is also a key part of ensuring alignment with the IHRL system.<sup>69</sup>

The Bonavero Report (2023) identifies that, in order to meet IHRL obligations, domestic human rights bills must create a framework which provides for both non-judicial and judicial remedies, ensuring that these are independent, impartial, timely and accessible, and lead to reparation of some form.<sup>70</sup> The planned incorporation of the right to a healthy environment also warrants analysis, with the Consultation paper acknowledging that Scotland, and indeed the wider UK, is in breach of Article 9(4) of the Aarhus Convention, which sets forth the right to remedies that are fair, equitable, timely and not prohibitively expensive.<sup>71</sup>

The adjudication of ESCR raises particular questions relevant to the provision of remedies, namely the applicability of existing judicial tests to the nature of these rights, and how frameworks of remedies can create capacity to address the increased likelihood of systemic rights violations.<sup>72</sup> As such, this section will consider questions of two parts:

1. Do the proposals include a framework of remedies?
  - a. Does this framework provide for non-judicial and judicial remedies?
  - b. How will timely, accessible remedies be supported by the framework?
  - c. Are all institutions tasked with overseeing remedies independent and impartial?
  - d. How will the framework ensure the availability of reparations?

---

<sup>68</sup> Boyle (n4) p10

<sup>69</sup> A.8 Universal Declaration of Human Rights 1948 (UN), A.2(3) International Covenant on Civil and Political Rights 1966 (UN)

<sup>70</sup> Bonavero Report (2023) (n19) p46-51.

<sup>71</sup> Consultation paper (n8) p21; A.9(4) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (UNECE).

<sup>72</sup> Boyle (n4) p32-33

- e. How will the framework navigate specific demands for the right to a healthy environment?

2. How does the framework navigate specific questions of ESCR adjudication?

## 4.2. Framework of Remedies

The Consultation Paper discusses plans for a multi-institutional framework of remedies, setting forth a clear and comprehensible roadmap.<sup>73</sup> However, there is a noticeable lack of detail provided as to how mechanisms may operate in practice. Nevertheless, some key developments are identifiable and enable scope for analysis.

### 4.2.1. Judicial and Non-Judicial

The plans recognise the importance of both judicial and non-judicial remedies. Emphasising the former as a matter of last resort, the proposed framework commits to prioritising “*getting things right first time*”, to resolve issues before the need for judicial processes.<sup>74</sup> Multi-institutional capacity building will support this aim, particularly through an expanded remit for the SPSO to streamline complaints handling across public service duty-bearers.<sup>75</sup> However, further consideration needs to be given to whether individuals are able to pursue judicial remedies in the first instance if so desired, bypassing the mechanisms set forth for early complaints handling.

### 4.2.2. Timely and Accessible

An emphasis on the need for early identification and response, supported by multi-institutional capacity building, forms a key component of the delivery of timely and accessible remedies. Plans for early complaints mechanisms include allowing the SPSO to receive oral complaints, and not requiring applicants to specify the right concerned in instances of escalated complaints.<sup>76</sup> This anticipates barriers that might be faced by rights-holders in making complaints, demonstrating a proactive approach to accessibility and supporting the ease of early identification.

This is coupled with increased opportunities for early resolution, granting the SPSO powers to issue declarations of non-compliance.<sup>77</sup> Although strengthening opportunities for early identification and resolution is certainly a welcome step, it is essential that enhanced powers are matched with increased resources. If this is not

---

<sup>73</sup> Consultation paper (n8) p36

<sup>74</sup> Ibid, p34

<sup>75</sup> Ibid, p39

<sup>76</sup> Ibid

<sup>77</sup> Ibid

done, processes risk creating a backlog and having the adverse effect of obfuscating the provision of timely and accessible remedies.

Clear emphasis on multi-institutionalism will support accountability and the ease with which rights-holders can access remedies quickly.<sup>78</sup> However, a multitude of actors involved may risk over-complication, and as such the creation of a clear and user-friendly framework is paramount. The plans highlight the importance of strengthening access to advocacy and advice services to support rights-holders in taking action, with increased powers for the SHRC a central part of proposals.<sup>79</sup>

Access to advocacy services will also support the delivery of timely and accessible remedies in the court system, with a lack of knowledge or access to support services often cited as a barrier to taking action, one that the Consultation Paper itself acknowledges.<sup>80</sup> Although noting a commitment to legal aid reform as integral to this, in reality progress is stagnant.<sup>81</sup> As such, a vague commitment is not reassuring. Legal aid is a vital component of access to justice, and a stronger commitment to pushing ahead with reforms would have been preferable in these proposals.

The UNCRC (Incorporation) Bill created specific obligations intended to promote participation of children in proceedings that affect their lives, and the Consultation Paper notes that active consideration of whether a similar provision may be applicable in the context of the new Bill, and the much wider range of rights-holders concerned, is ongoing. Adapting this provision may be a fruitful step to ensuring accessibility, particularly for individuals with specific barriers to participation. Involving key rights-holders in discussions would be advantageous, ensuring that final mechanisms address the needs and concerns of those for whom they are designed.

The strengthening of existing structures and emphasis on an easy to engage with framework for remedies, from early complaints to the courts, displays a commitment to the provision of timely and accessible remedies. This is a core part of the aim to create a multi-institutional culture of human rights engrained throughout Scottish society and facilitates the creation of conditions that allow individuals to access their rights – foundational to both the obligations to provide effective remedies and to fulfil human rights.

---

<sup>78</sup> Consultation paper (n8) p2

<sup>79</sup> Ibid, p34

<sup>80</sup> Ibid, p38

<sup>81</sup> Legal Aid is an ongoing point of frustration in Scotland. Most recently, the Law Society of Scotland expressed frustration at the failure to include legal aid reform from the 2023-24 Programme for Government, announced 5th Sept 2023. See Law Society of Scotland, '*Legal aid left in the dark despite welcome focus on justice sector*', 5th September 2023. Accessed - <https://www.lawscot.org.uk/news-and-events/law-society-news/legal-aid-left-in-the-dark-despite-welcome-focus-on-justice-sector/> [07/09/2023]

### 4.2.3. Independent and Impartial

Embedding multi-institutional capacity building at the heart of the proposed framework for remedies, particularly through affording increased powers to the SPSO and SHRC, both independent bodies, indicates a commitment to independence and impartiality in theory and in practice. With judicial remedies available, and the Courts clearly separated from executive influence, this compounds a system of transparency, scrutiny and accountability.

### 4.2.4. Reparations

The Consultation Paper provides detail on possible outcomes for both judicial and non-judicial remedies, building on the existing framework of remedies within the Scottish legal system.<sup>82</sup> In regard to non-judicial outcomes, the proposed power of the SPSO to issue declarations of non-compliance allows clear areas of improvement to be identified.

The intention is that SPSO recommendations will remain non-binding, with plans arguing that this allows for maximum flexibility in avenues for redress, encouraging multi-institutional collaboration. Whilst collaborative approaches are a strength, especially in the context of progressive realisation, purely non-binding recommendations risk frustrating the provision of timely, satisfactory remedies. Although SPSO recommendations are currently complied with on the whole, whether this would continue in light of an expanded remit remains to be seen.<sup>83</sup> With non-compliance reported to Parliament, a backstop does exist which is conducive to ensuring maximum compliance, and the identification of systemic issues in need of redress. However, with systemic issues not included in the remedy roadmap in the Consultation paper, how this fits into plans is unclear.<sup>84</sup>

Provision of judicial outcomes was a point of objection in the UNCRC (Incorporation) Bill, and thus poses a thorny issue for a HRBS. The Consultation Paper discusses the UNCRC (Incorporation) Bill's proposals to allow judicial strike down and declarations of incompatibility, noting that consideration will be given as to how best to navigate this in the new context.<sup>85</sup> As such, although the Consultation Paper clearly states that judicial outcomes will be aligned with the UN General Assembly's principles and guidelines, a welcome commitment, little detail is provided as to how these will apply within the Scottish context. Developments in the process of reconsideration for the UNCRC (Incorporation) Bill can be expected to shed light on how judicial reparations will be provided for in a HRBS. Although this is a limitation of the proposals, it is an unavoidable one, in line with the commitment to maximising protection whilst ensuring the drafting of a passable Bill.

---

<sup>82</sup> Consultation paper (n8) p44

<sup>83</sup> Ibid, p39

<sup>84</sup> Ibid, p36

<sup>85</sup> Ibid, p41

## 4.2.5. The Right to a Healthy Environment

Despite acknowledging that Scotland is currently in breach of Article 9(4) of the Aarhus Convention, relating to remedies under the right to a healthy environment, the Consultation paper does not offer detail on how a HRBS may either support the rectification of this or ensure the right for the future.<sup>86</sup> Ongoing developments distinct to these proposals seek to remedy this deficiency.<sup>87</sup> To ensure that incorporation of the right to a healthy environment is effectively implemented, it is essential that the Scottish Government not only commits to achieving the ongoing reforms but to creating a robust framework within a HRBS.

## 4.3. Adjudicating ESCR

In incorporating ESCR into Scots law, ensuring that judicial processes are equipped to deal with the nature of these rights, and of the claims that may arise in relation to them, is essential. The importance of non-judicial remedies to address ESCR rights violations are equally important, and the capacity for multi-institutional collaboration to achieve the progressive realisation of ESCR, as discussed above, is a particularly valuable aspect of proposals. Instead of revisiting these arguments, this section will focus on how judicial process can best address ESCR claims.

### 4.3.1. Standards of Review

Although the grounds for review, including unlawfulness, unreasonableness and unfairness, are equally applicable to ESCR as they are CPR, existing standards for review are less easily transferrable. In particular, the *Wednesbury* test of reasonableness, which focuses on whether any rational person could reasonably be expected to have arrived at the same outcome, is often criticised for failing to encapsulate the reality of ESCR enjoyment.<sup>88</sup> In South Africa, a new approach to this has instead centred on whether the policy leading to the right, rather than the outcome, is reasonable.<sup>89</sup>

The Consultation paper notes that the *Wednesbury* test sets a high threshold and discusses ongoing consideration in Scotland of whether a different approach to reasonableness should be adopted.<sup>90</sup> Proposals discuss the need to account for different models in existence internationally, as well as attitudes of the judiciary, legal professionals, and other relevant stakeholders to ensure that an updated approach is

---

<sup>86</sup> Consultation paper (n8) p21

<sup>87</sup> The Scottish Government has noted an ongoing process to increase environmental access to justice, interwoven with progress towards a HRBS. See Scottish Government (2023), 'Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021'. Accessed - <https://www.gov.scot/publications/report-effectiveness-environmental-governance-arrangements/documents/> [06/09/2023]

<sup>88</sup> Boyle (n4) p38

<sup>89</sup> *ibid*

<sup>90</sup> Consultation paper (n8) p43

aligned with international best practice, suited to the Scottish courts, and able to tangibly improve the provision of effective remedies. This is certainly a welcome step, and one that is likely to be addressed during the legislative process of the Bill.

### 4.3.2. Standing

With an increased likelihood of systemic violations where ESCR are concerned, for example, inadequate housing policies leading to a widespread failure to realise the right to an adequate standard of living, traditional judicial mechanisms that allow individual claims to be heard are an inefficient approach for the adjudication of ESCR.<sup>91</sup>

Accepting recommendation 23 of the Taskforce, the Consultation Paper provides for 'bodies with sufficient interest' to bring claims under a HRBS. This departs from the victim test, which largely precludes civil society organisations from bringing claims under human rights instruments, either on behalf of individual or collective claimants.<sup>92</sup> Bolstered by the SHRC's enhanced powers of standing, these proposals will change this and create capacity for systemic rights violations to be addressed.

## 4.4. Section Summary

This section firstly considered whether the proposed framework for remedies provides for both non-judicial and judicial remedies, ensuring that these are independent, impartial, timely and accessible, and lead to a reparation in some form.

- Entrenching multi-institutionalism, streamlining early complaints handling and strengthening advocacy and advice services are positive steps, enabling a collaborative approach to achieving progressive realisation and access to justice. The success of such an approach requires enhanced powers for the SPSO and SHRC to be matched with enhanced resources.
- Further consideration may be required to ensure the promotion of early complaints mechanisms does not obfuscate access to judicial processes in the first instance. The wider debate on legal aid reform is also of pertinence for the development of proposals, as are ongoing efforts to address non-compliance with IHRL standards regarding remedies under the right to a healthy environment.

The section then shifted focus to the question of ESCR adjudication, an area that is well addressed in the Consultation paper.

---

<sup>91</sup> Boyle (n4) 24

<sup>92</sup> Consultation paper (n8) p43

- Proposals consider the appropriateness of the existing test for reasonableness in relation to ESCR, and although no concrete alternative is offered, a commitment to aligning with IHRL best-practice in this regard is clearly stated. Moreover, the extension of standing to allow systemic violations to be addressed is a particularly welcome step.

Overall, access to justice remains a work in progress. Robust mechanisms that build on the promising commitments detailed in the Consultation paper whilst addressing the issues outlined would be welcome in a draft HRBS. Involving key rights-holders in the formulation of final mechanisms would be a constructive step to addressing key concerns and needs in relation to access to justice.



## Section V: Monitoring and Reporting

---

This section draws on Part 3.3 of the Bonavero Report (2023) and is particularly relevant to Consultation questions 22-26, 31, 32 and 40-44.

### 5.1. Introduction

Mechanisms for monitoring and reporting allow States to identify, understand and stay informed of how rights are, or are not, being enjoyed by all individuals within their jurisdiction.<sup>93</sup> Reporting obligations are an integral part of the IHRL system, with States required to engage in numerous reporting cycles for specific international treaties, as well as the UN's Universal Periodic Review (UPR).

Noting that the international obligations in respect to monitoring and reporting can be onerous, the Bonavero Report (2023) emphasises the need for a national system to ensure optimal engagement and highlights the creation of a formal national mechanism for implementation, reporting and follow-up (NMIRF) as best practice. The UK does not currently have a NMIRF, despite various UN treaty bodies recommending the creation of one.<sup>94</sup> Such a recommendation was also made by the Taskforce.<sup>95</sup>

The Bonavero Report (2023) identifies that NMIRFs should be permanent, established by either the executive or legislature, and possess a structure, mandate and resources to enable multi-institutional collaboration and coordination in the tracking of human rights implementation. Tailored to the specific context in question, such a system should not only ensure engagement with international reporting cycles but promote national reflection, with findings used to ensure the realisation of human rights in the domestic context.<sup>96</sup>

Ensuring that institutions involved have adequate capacity to effectively engage in such a framework is emphasised, with the value of National Human Rights Institutions (NHRIs) particularly identified.<sup>97</sup> Additionally, parliamentary involvement in monitoring processes is desirable, enhancing the process of policy implementation by increasing awareness and ensuring executive accountability.<sup>98</sup>

As such, this section will pose the following questions to the Scottish proposals:

---

<sup>93</sup> Bonavero Report (2023) (n19) p55

<sup>94</sup> Ibid, p56-58

<sup>95</sup> National Taskforce for Human Rights Leadership (n31) p18, rec.30

<sup>96</sup> Bonavero Report (2023) (n19) p55

<sup>97</sup> Ibid, p59

<sup>98</sup> Ibid, p60

1. Does the Consultation paper propose a framework for monitoring and reporting?
  - a. Is this done through the creation of an NMIRF?
  - b. Does this involve ensuring institutional capacity to engage, reflecting the value of NHRIs?
  - c. Does this seek to empower both domestic reflection and the fulfilling of international duties?
2. Does the framework proposed create mechanisms to ensure parliamentary involvement, recognising in particular their function as a scrutiny body?

## 5.2. Creating a Framework for Monitoring and Reporting

### 5.2.1. A National Mechanism

The plans for a HRBS fall short of accepting recommendation 30 of the Taskforce and do not propose the creation of an NMIRF. Instead, they highlight that the existing ‘Ministerial model’ is an example of good practice aligned with UN guidance, and place emphasis on strengthening these mechanisms.<sup>99</sup>

In the absence of an NMIRF, this section will focus on how far the proposed alternatives may achieve the same aims – primarily, creating a system that ensures multi-institutional collaboration to track progress on human rights realisation, ensuring institutional capacity-building and reflecting the value of NHRIs for effective engagement.

#### *A. Monitoring*

In setting out plans for strengthening existing monitoring mechanisms, the Consultation Paper places considerable emphasis on multi-institutional collaboration and capacity building, centring on the empowerment of the ‘everyday accountability sector’.<sup>100</sup>

Under the plans, existing scrutiny bodies will be required to assess the public authorities they oversee in line with human rights standards. Increased collaboration between scrutiny bodies, including the enhanced powers of the SPSO, will facilitate transparency and the identification of systemic human rights issues, which are to be reported to the SHRC.<sup>101</sup> Building on their existing powers to undertake inquiries, the proposals seek to enable the SHRC to launch investigations, facilitating the research and investigatory work needed for effective monitoring.<sup>102</sup>

---

<sup>99</sup> Consultation paper (n8) p52

<sup>100</sup> Ibid, p42

<sup>101</sup> Ibid, p40

<sup>102</sup> Ibid, p42

## B. Reporting

In regard to the creation of reporting duties, the Consultation paper notes the need for these to complement existing duties under the Public Services Equalities Duty (PSED) and Fairer Scotland Duty, welcoming views on how this may function in practice.

Reference is made to modelling mechanisms on section 15 of the UNCRC (Incorporation) Bill, which placed robust reporting duties on public authorities. This section required duty-bearers to detail actions taken to ensure compliance and in view of improving rights protection, as well as planned actions for the next reporting cycle.<sup>103</sup> Considering the nature of progressive realisation, and the arguments tendered against the *Wednesbury* test, reporting duties must include reflection not solely on the outcome of actions but progress taken towards realisation. As such, adapting section 15 of the UNCRC (Incorporation) Bill would be a positive step for a HRBS.

### 5.2.2. Institutional Capacity Building and the Importance of NHRIs

As discussed above, plans to bolster existing monitoring mechanisms centre on institutional capacity building and the empowerment of the ‘everyday accountability sector’, in particular, the SHRC. Part of the multi-institutional approach embedded throughout the Paper, these plans clearly reflect the importance of NHRIs and the need for domestic capacity building in a framework for monitoring and reporting.<sup>104</sup> Despite the lack of an NMIRF, this is in line with the standards set forth in the Bonaverro Report (2023).

### 5.2.3. Domestic Reflection and International Engagement

Clear emphasis is placed on monitoring and reporting mechanisms as part of a multi-institutional culture of human rights in Scotland. Promoting domestic reflection, there are opportunities for rights concerns to be identified and addressed through a system of collaboration. This is particularly valuable in the context of progressive realisation.

However, no specific mention is made in the proposals as to specific mechanisms for reporting on the proposed procedural duty for CEDAW, CERD and CRPD. It should be considered whether such mechanisms could be created to minimise the limitation created by a purely procedural duty. This could also feed into strengthened engagement with the international reporting duties attached to these treaties, aiding

---

<sup>103</sup> UNCRC (Incorporation) (Scotland) Bill 2021, s.15

<sup>104</sup> Bonaverro Report (2023) (n19) p58-59

the implementation and operationalisation of the duties in a HRBS in line with IHRL standards.

Moreover, further consideration could be given to the creation of an NMIRF. Although the multi-institutional nature of proposals may be conducive to collaboration, it is essential that this is simple and clearly structured. Otherwise, the lack of a formal framework may limit the success of plans.

### 5.3. Enabling Parliamentary Involvement and Scrutiny

Bolstering the proposed framework for monitoring and reporting, the Consultation Paper creates capacity for parliamentary involvement and function as a scrutiny body.

#### 5.3.1. Parliamentary Involvement in Monitoring and Reporting

The proposed Human Rights Scheme involves a reporting duty for ministers and, as mentioned above, includes obligations in respect of budgetary reporting. Enabling scrutiny on government spending towards the realisation of human rights as well as the extent to which improvements are or are not felt by rights-holders will allow Parliament to take an active role. The scheme itself is to be laid before Parliament to determine its scope and create a process for amendment, further entrenching parliamentary involvement in the operationalisation of a HRBS.<sup>105</sup>

Section 16(A) of the UNCRC (Incorporation) Bill guides section 15, requiring ministers to issue guidance on reporting duties for public authorities. Enabling significant parliamentary oversight, this section also requires MSPs to consult rights-holders and key stakeholders to inform such guidance. Replicating this would support an approach that centres the views and experiences of rights-holders. Furthermore, section 16(B) of the UNCRC (Incorporation) Bill creates distinct reporting duties for Parliament. Adapting these duties for a HRBS would be a welcome step to ensuring transparency and accountability whilst embedding mechanisms for parliamentary involvement in monitoring and reporting.

#### 5.3.2. Pre-legislative Scrutiny

Recognising the necessity of pre-legislative scrutiny, the Consultation Paper explores the possible introduction of statements of compatibility alongside existing statements of legislative competence. Under the Scotland Act 1998, the latter requires legislation to be considered in line with the Convention rights within the HRA. A statement of compatibility with a HRBS could enable scrutiny of obligations regarding ICESCR, the right to a healthy environment, CEDAW, CERD and CRPD

---

<sup>105</sup> Consultation Paper (n8) p49

and could compliment a further statement of compatibility regarding UNCRC compliance.

It is unclear whether a statement of compatibility with a HRBS would apply to the relevant minister and/ or to the Presiding Officer. The Consultation Paper notes that the form that parliamentary scrutiny of bills takes is a matter for the Scottish Parliament itself.<sup>106</sup>

Although further detail on the form of such statements would be welcome in the drafting of a HRBS, the proposal to extend statements of compatibility to the rights in the HRBS is a welcome step - creating a near-complete set of international instruments against which new legislation would be assessed. This has the potential to greatly enhance opportunities for a thorough consideration of human rights implications, recognising that human rights are universal, inalienable, indivisible, interdependent and interrelated.

## 5.4. Section Summary

This section began by considering how the proposed framework for monitoring and reporting compares to standards of best practice.

- Although the Consultation paper does not propose to create an NMIRF, proposals do identify the need to both strengthen existing monitoring mechanisms and establish a specific reporting duty for a HRBS, recognising the importance of effective engagement in these processes.
- Anchoring proposals in the empowerment of the SHRC and SPSO reflects the standards identified in the Bonavero Report (2023) regarding NHRIs and the essentiality of institutional capacity building.
- Some significant gaps do remain to be filled. Future points of reflection could include specific mechanisms for reporting on the proposed procedural duty on CEDAW, CERD and CRPD and the adaptation of section 15 of the UNCRC (Incorporation) Bill to create robust reporting duties for public authorities.

Focus then turned to the creation of opportunities for parliamentary involvement.

- Whilst the planned Human Rights Scheme involves reporting duties, whether Section 16(A) of the UNCRC (Incorporation) Bill could be replicated is a key point for consideration, supporting an approach that centres the views and experiences of rights-holders. Beyond this, the proposed creation of an additional statement of compatibility is a welcome step. With final details to be

---

<sup>106</sup> Consultation paper (n8) p51

decided by Parliament itself, existing plans in the Consultation paper reflect the importance of mechanisms for parliamentary scrutiny.

## Section VI: Public Participation

---

This section draws on Part 3.4 of the Bonavero Report (2023) and is particularly relevant to Consultation questions 13, 39 and 43.

### 6.1. Introduction

The right to participate in public life goes far beyond the right to vote.<sup>107</sup> The obligation on States to embed public participation in the process of creating, introducing and amending human rights bills derives from this right, and opportunities for participation can take different forms. The Bonavero Report (2023) highlights the importance of direct participation, including engagement in citizens assemblies and consultation processes, for example, as well as indirect participation through freely elected representatives.<sup>108</sup>

Both the organisation of the Consultation itself, as an example of direct participation, and the manner in which proposals seek to incorporate public participation in the ongoing journey of a HRBS are relevant to consider in this section. Moreover, the degree to which mechanisms for direct participation create real opportunities for meaningful participation, accessible to all rights-holders, is foundational. The PANEL principles promoted by the SHRC reflect this standard, highlighting the importance of 'active, free and meaningful' participation cognisant of accessibility issues.<sup>109</sup> With the UNCRC (Incorporation) Bill praised by the Bonavero Report (2023) as an example of good practice in its approach to centring the voices of children, Scotland has an existing track record that is desirable to replicate in future legislative processes.<sup>110</sup> Whether the Consultation paper reflects this is an important point of consideration.

The Bonavero Report (2023) also emphasises the value of indirect participation, and the importance of elected representatives being afforded 'the maximum possible opportunity to assess, scrutinise and influence' the manner and form of domestic human rights bills and their implementation.<sup>111</sup>

Accordingly, this section will ask the following questions of the public participatory processes throughout the consultation and beyond:

1. How is direct participation structured?

---

<sup>107</sup> Bonavero Report (2023) (n19) p63

<sup>108</sup> Ibid, p63-68

<sup>109</sup> Scottish Human Rights Commission (SHRC) (2018), *Human Rights Based Approach: A Self-Assessment Tool*, SHRC, p3. Accessed - [https://www.scottishhumanrights.com/media/1814/shrc\\_panel\\_self-assessment\\_tool\\_vfinal.pdf](https://www.scottishhumanrights.com/media/1814/shrc_panel_self-assessment_tool_vfinal.pdf) [06/09/2023]

<sup>110</sup> Bonavero Report (2023) (n19) p62

<sup>111</sup> Ibid, p74

- a. Do mechanisms create real opportunities for meaningful participation which can influence outcomes and are accessible to all rights-holders?
  - b. Do plans acknowledge potential challenges that may arise in relation to direct public participation, and is there provision for these to be mitigated?
2. How is indirect participation structured?
- a. What opportunities for scrutiny does Parliament have / will they be afforded in the drafting process?
  - b. Is there support for MSPs to engage with their constituents directly?

## 6.2. Direct Participation: Meaningful and Accessible

McCall-Smith describes the ‘emancipatory effect’ of public participation, whereby the voices of those often unheard in decision-making and policy-building are centred.<sup>112</sup> A failure to ensure that processes are meaningful and accessible can undermine this effect, contributing to the further marginalisation of already marginalised voices.<sup>113</sup> In navigating the need for meaningful and accessible participation, it is essential to understand what is meant by these terms and how they might be achieved.

One of the key components of meaningful participation is that participants must be able to formulate informed opinions on the topics concerned. The Bonavero Report (2023) highlights the importance of information provision, education programmes and awareness raising campaigns, depending on the process concerned.<sup>114</sup> This is echoed by McCall-Smith, who emphasises that participants must be able and empowered to form their own opinions, whilst other scholars have noted that a lack of information undermines otherwise well-designed processes.<sup>115</sup> The SHRC emphasises that information must be provided in an understandable format, accounting for access needs (e.g. Plain English, Easy Read, BSL).<sup>116</sup>

Furthermore, opinions must be listened to, and seen to be so. Regardless of whether a favourable or contrary decision is made, participants must feel that their views are valued and considered, ensuring that participation is more than symbolic.<sup>117</sup>

---

<sup>112</sup> See Kasey McCall-Smith (2021), ‘Entrenching children’s participation through UNCRC Incorporation in Scotland’, *The International Journal of Human Rights*

<sup>113</sup> Ibid

<sup>114</sup> Bonavero Report (2023) (n9) p65

<sup>115</sup> McCall-Smith (n112) p12; Inna Junaenah, Abd Shukor Mohd Yunus & Normawati Hashim (2022), ‘Adequacy of Public Information for Meaningful E-Participation in Policy-Making: Human Rights-Based’ 6 *Journal of Southeast Asian Human Rights*, 153, p158

<sup>116</sup> SHRC (n109) p3

<sup>117</sup> See SHRC (n109). McCall-Smith (n112) p12 highlights that opinions must be “demonstrably considered in decision-making process”.



In highlighting the value of the UNCRC (Incorporation) Bill's approach, the Bonavero Report (2023) notes that specific attention must be paid to the needs of different groups and communities, particularly those whose voices are often overlooked.<sup>118</sup> The SHRC similarly emphasises the importance of representation, accounting for geographic barriers, marginalised groups and the protected characteristics.<sup>119</sup> This requires an approach sensitive to the national context; for instance, effective outreach to rural and remote communities is of particular relevance for Scotland.

As such, processes for direct participation must ensure that individuals are supported to formulate informed opinions, that these opinions are considered, influence outcomes and that processes adopt a proactive approach to representation. Underlying each of these, accessibility demands a consideration of the barriers to participation and the adoption of steps to mitigate these in order to ensure that all individuals have both access to and the ability to engage in participatory processes. This section will consider how mechanisms for direct participation, including the Lived Experience Boards, the consultation process and plans for involvement in the implementation of a HRBS meet these standards.

### 6.2.1. Lived Experience Board

The LEB was created in 2022 to ensure that the views and experiences of those directly impacted by deficiencies in human rights protections were accounted for in the drafting of the Consultation Paper. The value of the LEB's engagement is reflected in the paper itself:

“The contributions of the members of the LEB helped bridge the gap between human rights as abstract concepts and the real impact felt in people's lives when their human rights are not fulfilled.”<sup>120</sup>

The importance of such participation cannot be overstated, with the translation of legal norms at an international level into tangible rights at the domestic underpinning the process of incorporation. Proposals note that engagement with the LEB will continue throughout the consultation itself and there is a commitment to its involvement in the drafting and implementation of a HRBS.<sup>121</sup>

The structure of the LEB aims to facilitate meaningful and accessible participation, with three distinct groups supported by experienced NGOs; the Human Rights Consortium Scotland, the Scottish Commission for Learning Disabilities and Together: Alliance for Children's Rights.<sup>122</sup> Creating additional duties for these

---

<sup>118</sup> Bonavero Report (2023) (n19) p62

<sup>119</sup> SHRC (n109) p3

<sup>120</sup> Consultation paper (n8) p55

<sup>121</sup> Ibid, p55

<sup>122</sup> Ibid, p8

organisations was matched with specific funding, integral to ensuring their capacity to engage fully with this role.<sup>123</sup>

One of the key findings of the LEB was the need to do more to ensure that participation is not merely symbolic but listened to and acted upon.<sup>124</sup> The publishing of a paper responding to feedback from the Board, as well as a commitment to meeting members individually is a welcome step, demonstrating that the voice of the LEB is taken seriously.<sup>125</sup> However, the Human Rights Consortium Scotland noted concern that a number of LEB recommendations regarding the Consultation process were not reflected in the final paper.<sup>126</sup> Further publications reporting on how recommendations are considered and decided upon would be conducive to ensuring full transparency and promoting a feeling of empowerment amongst participants.

## 6.2.2. Consultation

Part 10 of the Consultation Paper sets out detail on how the consultation will function, emphasising that all those who wish to have their views heard in the drafting of a HRBS should have the opportunity to do so.<sup>127</sup>

### A. Informed

In its opening section, the Consultation Paper offers significant background information on international human rights, the role of devolution and Scotland's human rights journey so far, providing essential context to the proposals. Moreover, the publication of information packs and guidance intended to support community groups to hold their own discussions is a further positive step in supporting informed participation. The online 'Facilitator's Guide' provides clear instructions for how a meeting could be structured as well as background information and suggested questions for discussion.<sup>128</sup> The inclusion of a section on how a HRBS may impact day-to-day life helps ground discussions and may support individuals to understand the importance of participating in the consultation process. Finally, the guide concludes with instructions for how to respond to the consultation which, importantly, allows for group responses to be submitted. As such, the guide provides a clear framework to support discussions, information to enable the formulation of informed opinions, and a direct next step for both individuals and groups to have their opinions heard. This is a valuable mechanism in aid of informed participation.

---

<sup>123</sup> Scottish Government, 'Human Rights Bill Lived Experience Boards'. Accessed - <https://www.gov.scot/groups/human-rights-bill-lived-experience-boards/> [06/09/2023]

<sup>124</sup> Consultation paper (n8) p55

<sup>125</sup> Ibid

<sup>126</sup> See Human Rights Consortium Scotland (2023), 'Guide to responding to the Human Rights Bill for Scotland Consultation'. Accessed - <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf> [22/09/23]

<sup>127</sup> Ibid, p54

<sup>128</sup> Scottish Government, 'Human Rights Bill Consultation: Facilitator Guide' (2023). Accessed - <https://www.gov.scot/publications/human-rights-bill-consultation-facilitator-guide/pages/1/> [06/09/2023]

Although a full analysis of the structure of Consultation questions is beyond the scope of this paper, it will be interesting to see whether participants feel that the supporting information is matched with understandable and accessible questions. This is perhaps most relevant when considering questions on the navigation of devolved competence and the creation of legal obligations. For instance, question 5 asks:

“Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.”<sup>129</sup>

Pertaining to the purely procedural duty proposed for CEDAW, CERD and CRPD, this question reflects an ongoing consideration of whether specific rights within these treaties could be handled differently to enhance protection whilst still ensuring workability within the constraints of devolution. Although seeking opinions on which rights individuals feel are of particular relevance is necessary, inviting respondents to explain *how* this could be done asks them to navigate complex constitutional law, something even non-specialist lawyers may find challenging.

### *B. Representative*

Ensuring representation is a clear aim of the consultation process, which states that:

“Everyone with an interest should have the opportunity to offer their views.”<sup>130</sup>

Although the right to take part in public affairs is limited to citizens, rather than all those under the jurisdiction of the state, the rights a HRBS seeks to incorporate will apply to non-citizens as well as citizens.<sup>131</sup> As such, it is desirable that the consultation paper is open to the views of all right-holders in Scotland, including (but not limited to) people seeking asylum and refugees, non-citizen workers and their families, and students. The above quote suggests that this is the case, and no exclusions to participation are listed either in the Consultation Paper itself or online. Although this is most welcome, the lack of an explicit inclusionary statement may itself be perceived as exclusionary; failing to emphasise to people in Scotland who may feel alienated from policy-making and human rights, particularly non-citizens, that their response is desired and valued.

---

<sup>129</sup> Consultation paper (n8) q5

<sup>130</sup> Ibid, p54

<sup>131</sup> UN Office of the High Commissioner for Human Rights (OHCHR) (2018), '*Guidelines on the effective implementation on the right to participate in public affairs*', OHCHR, p3. Accessed - [https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs_web.pdf) [06/09/2023]. A1(2) and (3) of ICERD state that rights must be applied without discrimination to non-citizens equal to citizens.

With information packs and guidance designed to support autonomous engagement with the consultation paper by community groups, increasing awareness amongst key communities is important to ensure representation. Third sector organisations play a significant role in this, particularly in supporting the participation of rights-holders from communities that may otherwise feel disenfranchised from human rights or policy making.

Furthermore, whilst translation into all global languages is, inevitably, beyond the capacity of the Consultation, the lack of language availability may hinder the participation of non-native English or Gaelic speakers, and particularly those without access to or fluency in reliable online translation tools. Indeed, the LEB emphasised the importance of other language availability to ensure full participation across Scotland's multicultural communities.<sup>132</sup> For non-native English or Gaelic speakers, third-sector organisations may prove vital to supporting participation. As such, the Guide and Facilitator's Guide could have aimed to better support organisations providing language support and engaging the communities they work with.

An active consultation campaign is essential to engaging all corners of the Scottish population. Plans to hold Regional Discussion Events targeted at a range of communities in urban, rural and remote areas, including across the Highlands and Islands, aim to engage people from all corners of Scotland and particularly those often unheard.<sup>133</sup> As of August 2023, free events have been organised in Dumfries, Glasgow, Inverness and Dundee, as well as two online. Tickets for an event planned to take place in Portree now redirect to an additional online date.<sup>134</sup> Additional online dates may have supported extended reach.<sup>135</sup>

Similarly, the LEB discussed the importance of outreach on media and social media to access as wide an audience as possible.<sup>136</sup> Although a full analysis of how media and social media has been utilised to support the Consultation campaign is beyond the scope of this paper, it is perhaps notable that no feed posts appear to have been published on either the official Scottish Government Instagram or Facebook pages on the launch date itself, or in the weeks following.<sup>137</sup> The official Government X account re-shared a post from 'Scot Gov Fairer' highlighting the launch on the 15<sup>th</sup> June.<sup>138</sup> A post-consultation analysis of how these mediums were used to raise

---

<sup>132</sup> Human Rights Bill Lived Experience Board (2022) '*Block One (February-March 2022): Session 3 - Comments on Consultation*'. Accessed - <https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/> [06/09/2023]

<sup>133</sup> Consultation paper (n8) p27

<sup>134</sup> Scottish Independent Advocacy Alliance (2023), '*Human Right Bill Consultation Events*'. Accessed - <https://www.siaa.org.uk/member-news/human-rights-bill-consultation-events> [06/09/2023]; Scottish Government (2023), '*A Human Rights Bill for Scotland: Consultation - Engagement Events*'. Accessed - <https://consult.gov.scot/equality-and-human-rights/a-human-rights-bill-for-scotland-consultation/> [06/09/2023]

<sup>135</sup> Junaenah et al (n115) p163

<sup>136</sup> Human Rights Bill Lived Experience Board (n123)

<sup>137</sup> Scottish Government on Facebook - <https://www.facebook.com/TheScottishGovernment>; Scottish Government on Instagram - <https://www.instagram.com/scotgov/> [both accessed 08/09/2023]

<sup>138</sup> Scottish Government on Twitter / X (15<sup>th</sup> June 2023). Accessed - <https://twitter.com/ScotGovFairer/status/1669285894858199040> [08/09/2023]

awareness of the Consultation in as many communities as possible could be a fruitful step to inform future approaches to participation.

### *C. Accessible*

In order to ensure that “everyone with an interest” is able to have their views heard, specific attention to accessibility is essential. The consultation is available in a number of different versions, and responses can be logged online, by email or by post. It is also available in both English and Gaelic, with additional Easy Read and BSL formats.<sup>139</sup> Although the lack of further language support is noted above, these are all positive steps in ensuring accessibility and representation.

The time frame for the consultation is 16 weeks, a slight extension to the minimum requirement of 12 weeks.<sup>140</sup> This is a further welcome step towards accessibility, recognising the scope and significance of this consultation and allowing time for campaign events to take place and have effect.

One of the key recommendations of the LEB was that a consultation should allow for both face-to-face and online engagement.<sup>141</sup> For this reason, the mix of in-person and online discussion events is very welcome, as is the opportunity for responses to be both online and on-paper.

### *D. Considered*

Ensuring that consultation responses are considered, and seen to be so, in the drafting of a HRBS is an essential component of meaningful participation and crucial to ensuring that participants feel valued. Instilling a sense of ownership and facilitating increased understanding of human rights issues, this lays groundwork for individuals across Scotland to remain actively involved in Scotland’s human rights journey – supporting the creation of a human rights culture from the ground up.

The Consultation paper commits to publishing an analysis report and public responses where permission has been given. This is an important step in acting upon consultation responses, supporting participants to feel heard, and facilitating transparency and accountability.<sup>142</sup> It would be of further value to provide, on publication of a HRBS, explanatory material detailing how views were considered and explaining why, or why not, responses were acted upon.

---

<sup>139</sup> Scottish Government (2023), ‘A Human Rights Bill for Scotland: consultation’. Accessed - <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/> [06/09/2023]

<sup>140</sup> UK Government (2008), ‘Code of Practice on Consultation’, p.8. Accessed - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/100807/file47158.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf) [06/09/2023]

<sup>141</sup> Human Rights Bill Lived Experience Board (2022) ‘Block One (February-March 2022): Session 3 - Comments on Consultation’. Accessed - <https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/> [06/09/2023]

<sup>142</sup> Consultation paper (n8) p55

### 6.2.3. Implementation

Certain elements of implementation will also involve participatory processes, including the determination of the MCOs.<sup>143</sup> However, little detail is given as to how this will function in practice, with the Consultation Paper noting that this is under ongoing consideration. It is essential that feedback from the consultation process - including analysis of the reach and success of participatory events, the structure of the process and the responses themselves - is taken on board and given due weight in shaping the process for MCO determination.

The Consultation Paper also commits to maintaining the LEB and reshaping its involvement to best suit each stage of the HRBS process.<sup>144</sup> This is a most welcome step, however with a similar lack of detail provided at this stage, how this is achieved must again account for feedback and reflections from past involvement to maximise the potential of the LEB as a tool for entrenching active, meaningful and accessible public participation.

Attention is also paid to ensuring that a bill itself is accessible. Acknowledging that direct incorporation, which requires the replication of complex legal language, is a potential barrier to accessibility, the plans commit to providing a “clear explanation of what the rights are and what they mean”.<sup>145</sup> The paper invites views on how best this can be achieved: a welcome inclusion that provides space for individuals to voice concerns and support the drafting of a HRBS that all rights-holders are able to engage with.

Finally, the centrality of dignity is a key step in achieving accessibility. As previously discussed, dignity is a useful tool for connecting rights-holders to their rights.

## 6.3. Indirect Participation

The Bonavero Report (2023) places particular emphasis on the value of indirect public participation through elected representatives in the shaping and amendment of domestic human rights bills. Ensuring opportunities for parliamentary scrutiny and influence in the drafting of a HRBS in tandem with supporting MSPs to engage with their constituents on these issues are thus core components of effective participation.

### 6.3.1. Parliamentary Involvement

---

<sup>143</sup> Consultation paper (n8) p33

<sup>144</sup> Ibid, p55

<sup>145</sup> Ibid, p17

As discussed above, a HRBS will be put before Parliament, with opportunities for scrutiny and amendments throughout the legislative stages. Parliament will also be directly consulted in the creation of the proposed Human Rights Scheme, an essential tool for operationalising a HRBS and ensuring accountability through monitoring and reporting. Recognising the centrality of Parliament in these stages ensures that opportunities are made for cross-party scrutiny and influence.

Further opportunities for parliamentary involvement in the wake of a HRBS ensure that such scrutiny is afforded in the future realisation of rights. For example, the proposed introduction of statements of compatibility is a positive step towards entrenching opportunities for Parliament to scrutinise all proposed legislation against the rights protected in a HRBS, supporting their role in holding the executive to account.

The Consultation paper clearly recognises the significance of parliamentary involvement in drafting, implementing and operationalising a HRBS. Although ultimately a matter for the Scottish Parliament, an enhanced role for the Equalities, Human Rights and Civil Justice Committee in this process would be welcomed.

### 6.3.2. Engagement with Constituents

Although proposals note that a Human Rights Scheme may include specific groups that must be consulted by MSPs in monitoring and reporting processes, both encouraging engagement with constituents and targeting key members of the community, there is scant other reference to the need for MSPs to actively engage with the public. Further support for this may be valuable for ensuring that constituent engagement is encouraged across Scotland, and not subject to geographic disparity. Adaptation of Section 16(A) of the UNCRC (Incorporation) Bill could be constructive in this.<sup>146</sup>

## 6.4. Section Summary

Public participation is front and centre of these proposals, both in the Consultation process itself and in mechanisms for participation post-implementation. This section firstly considered the provision of opportunities for direct public participation, asking whether such opportunities were meaningful, accessible and tailored to the national context.

- There is a clear commitment to clarity and the provision of information to promote engagement and ensure accessible and meaningful participation:
  - The Consultation paper is available in a number of accessible formats, and itself provides considerable context to proposals.

---

<sup>146</sup> See discussion in section 5.3.1.

- The Consultation process is sensitive to the national context, with in-person discussion events targeting regions across Scotland and online equivalents supporting outreach to rural and remote communities.
  - The publication of guidance for the facilitation of group discussions and the ability to submit a group response is a very welcome step, cognisant of barriers to individual participation.
  - Nonetheless, the wording of some consultation questions and the minimal language availability may present barriers.
- Beyond the Consultation, the commitment to ensuring that the rights are well explained addresses the risk of legalistic language alienating rights-holders, whilst the centrality of dignity is conducive to empowerment and engagement.
  - The LEB has enabled the views and experiences of those impacted by deficiencies in rights protection to inform the drafting of the Consultation paper, and the commitment to retaining the LEB's involvement will ensure that these perspectives continue to underlie human rights decision making in Scotland. A report detailing how LEB feedback has been considered is a positive step in ensuring that participation is seen to be more than symbolic, with scope to build upon this. The publication of explanatory material detailing how responses were considered in the drafting of a HRBS would be of value.

This section then focused on indirect public participation, considering opportunities for parliamentary scrutiny and support for MSPs to engage with constituents.

- The proposed Human Rights Scheme reflects a commitment to creating mechanisms for parliamentary scrutiny. Additional detail on robust and Scotland-wide support for constituent engagement would be welcome in a final Bill, with the adaptation of Section 16(A) of the UNCRC (Incorporation) Bill a critical aspect for consideration.



## Section VII: Non-Regression

---

This section draws on Part 3.5 of the Bonavero Report (2023) and is of relevance to the Consultation at large. There is particular overlap with Consultation questions 1-3, 5 and 12.

### 7.1. Introduction

The obligation to safeguard against backward steps in the protection and realisation of human rights is highlighted by the Bonavero Report (2023) as particularly important for the progressive realisation of ESCR. Moreover, the Bonavero Report (2023) identified that this is an obligation of distinct concern for the UK in light of concluding observations by the UN Committee on ESCR and a 2019 report by Philip Alston, then UN Special Rapporteur on Extreme Poverty and Human Rights, which found that the UK was failing to ensure non-regression in the protection and realisation of ESCR.<sup>147</sup>

Regression may include both normative and empirical dimensions, spanning backsteps in both the provision of rights protection in law and in the effective enjoyment of rights in daily life.<sup>148</sup> Where challenges arise regarding conflicting rights, for example, freedom of expression and the obligation to prohibit hate speech, the Bonavero Report (2023) suggests that non-regression entails no regression in the mechanisms being used in the rights-balancing exercise.<sup>149</sup>

A HRBS must therefore create safeguards against regression. How this is provided for in the creation of obligations on duty-bearers, particularly in respect to progressive realisation, is a pertinent question. Operating in conjunction with UK wide human rights protections, it is also necessary to consider how a HRBS risks embedding a two-tier system of rights protection, and how this may lead to actual or perceived regression in effective rights enjoyment. Moreover, with a solely procedural duty being proposed for CEDAW, CERD and CRPD, the risk of a two-tier system being created within a HRBS itself must also be considered. Finally, the divergent trajectories of Holyrood and Westminster give rise to a question of whether regression at a UK level is a risk for Scotland, and indeed, whether Scotland has the capacity to mitigate this.

As such, this section will consider the following:

1. How does a HRBS propose safeguarding against regression?
2. Do the proposals risk contributing to or creating a two-tier system that might give way to regression?

---

<sup>147</sup> Bonavero Report (2023) (n19) p69

<sup>148</sup> Ibid, p70

<sup>149</sup> Ibid, p71

3. What might the impact of UK-wide regression be on human rights protection in Scotland, and is there capacity to mitigate this?

## 7.2. Safeguarding against Regression

Incorporating key human rights instruments through the creation of a HRBS is itself an important step forward in closing the incorporation gap, strengthening a void in rights protection post-Brexit and safeguarding against regression. However, in delivering a maximalist approach to incorporation within the limits of devolved competence, it is essential that the duties created ensure that a HRBS is part of a continued upwards trajectory of rights protection in Scotland.

In its approach to progressive realisation, the Consultation paper is clear that MCOs are a floor to be built upon, not a ceiling. The inclusion of progressive realisation as part of the duty to comply with ICESCR rights and the right to a healthy environment supports this vision, protecting against stagnation in the realisation of rights.<sup>150</sup>

The Bonaverio Report (2023) highlights the necessity of clear principles to guide balancing exercises and protect against regression where issues of conflicting rights arise. There is a lack of clarity on this in the Consultation Paper. Although the paper refers to the need for such principles, no detail is provided. Moving forward, it is essential to ensure that such principles are well formulated and effective in preventing regression.

## 7.3. Two-Tier System

The creation of a HRBS, centred on the protection of ESCR, will create a separate scheme of rights protection to those relating to CPR; namely, the UK-wide HRA. This is the inevitable result of the choice to prioritise a passable, workable bill rather than risk overstepping devolved competence by seeking to legislate in a way that interferes with the HRA or other reserved matters.<sup>151</sup>

The creation of separate schemes for rights protection may prove confusing for rights-holders and, depending on the success of each scheme, lead to a real or perceived difference in rights protection. It is thus essential that a maximalist approach is adopted, ensuring that any difference created is, although regrettable, unavoidable.

This is also true when considering the differing approaches to obligations, and the proposal to only create a procedural duty for CEDAW, CERD and CRPD in contrast to the compliance duty for ICESCR rights and the right to a healthy environment.

---

<sup>150</sup> Consultation paper (n8) p31

<sup>151</sup> Consultation paper (n8) p23. See also discussion in section 3.

Although a procedural duty may be strengthened by a robust culture of human rights, it remains that the rights within these treaties will lack ‘teeth’, which risks creating a hierarchy of rights protection within the bill itself.<sup>152</sup> It would be crucial for the impacts of this compromise to be minimised, guided by a full understanding of how far a HRBS may truly go under devolved competence. As highlighted, a commitment to rigorous further consideration, involving liaison with legal experts and supported engagement with key rights-holders, is essential to ensure a maximalist approach.

## 7.4. Regression at UK Level

Recent developments at UK level may present a barrier to fulfilling and advancing rights protection in Scotland. The Illegal Migration Act 2023 has implications for devolved competence, ending Scottish Ministers’ powers to support victims of trafficking and raising critical questions of how child protection obligations may operate.<sup>153</sup> This Act also impacts the nature of human rights protections in the UK and is likely to be in breach of IHRL.<sup>154</sup> How Scotland would reconcile UK wide obligations that require the breaking of IHRL with the heightened protections offered by a HRBS is a problematic question.

The Illegal Migration Act 2023 has only recently been passed and its full impact thus remains to be seen. It is nonetheless a concerning development. A recent study considered whether devolved health care policies available to people seeking asylum in Scotland are able to mitigate restrictive policies in reserved aspects of immigration and asylum, finding devolved policies unable to overcome structural inequalities created at UK level.<sup>155</sup> The knock-on effect of rights-restricting legislation at UK level on people living in Scotland is clear.

As discussed, the Consultation Paper opts not to adopt the Taskforce recommendation to restate the rights contained in the HRA, nor seek to incorporate UNCAT rights. The consultation asks how best a HRBS could restate a *commitment* to these rights, something which, in light of the differing trajectories of Holyrood and Westminster, is worth investigating closely.

Scotland’s continued progress towards a HRBS is a timely contrast to developments in Westminster. With limited power existing within devolved competence to prevent

---

<sup>152</sup> See discussion in section 3.

<sup>153</sup> See Kay M. Springham, KC (2023) ‘Opinion of Senior Counsel for JustRight Scotland, Scottish Refugee Council and Children and Young People’s Commissioner Scotland in the matter of the Illegal Migration Bill’, *JustRight Scotland*. Accessed - <https://www.justrightscotland.org.uk/wp-content/uploads/2023/07/Opinion-FINAL-040723-SIGNED-1.pdf> [09/09/2023]

<sup>154</sup> Public Law Project, Bonavero Institute of Human Rights, Amnesty International, Liberty and Immigration Law Practitioner’s Association (2023), ‘*The Illegal Migration Bill: Constitutional Implications*’, Liberty. Accessed - <https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/03/The-Illegal-Migration-Bill-Constitutional-Implications.pdf> [08/09/2023]

<sup>155</sup> See Anna Isaacs, Nicola Burns, Sara Macdonald & Catherine A. O’Donnell (2022), ‘I don’t think there’s anything I can do which can keep me healthy’: how the UK immigration and asylum system shapes the health & wellbeing of refugees and asylum seekers in Scotland’ 32 *Critical Public Health* 3, 422

this, it is essential that a HRBS reflects a maximalist approach to incorporation, protecting against regression as far as possible. A significant step forward in standards in one UK jurisdiction may well have a ripple effect.

## 7.5. Section Summary

This section first explored how the Consultation paper proposes to safeguard against regression.

- The creation of a HRBS is itself an important milestone for non-regression, supporting strengthened rights-protection in Scotland. Further clarity on principles to guide interpretation and rights-balancing exercises will be welcome in a final Bill.

Focus then shifted to consider whether a HRBS may contribute to a two-tier system of rights protection, jeopardising non-regression.

- The differing approach to obligations does inevitably risk creating a hierarchy of rights-protection within the Bill itself, reinforcing the importance that a maximalist approach is adopted to minimise such an effect. Moreover, how Courts will approach issues that balance UK wide Convention rights with incorporated rights may impact their realisation, augmenting the importance of further guidance on interpretation.

Finally, this section questioned the possible impact of UK-wide regression on human rights protection in Scotland.

- Although the reality of threats to rights-protection at UK level are impossible to answer concretely in this paper, they are essential for Scotland to be mindful of to realise a commitment to non-regression. Priority should be given to ensuring a maximalist approach, giving domestic effect to rights as far as possible.

## Section VIII: Conclusion

---

This paper has considered how the proposals detailed in the Consultation paper for a HRBS align with the international obligations relevant for domestic human rights bills, as identified in a collaborative report published by the Bonavero Centre for Human Rights.

Prioritising the creation of a passable framework does limit the scope of a HRBS. However, the proposal to avoid diluting certain rights to fit devolved limitations ensures the creation of an operational domestic framework whilst retaining alignment with IHRL standards, and with the obligation to respect, protect and fulfil human rights. A commitment to multi-institutionalism and the embedding of dignity is conducive to the creation of a collaborative culture of human rights in Scotland which empowers rights-holders. Focus on achieving a maximalist approach, and whether the duty to comply could be further extended, must be prioritised.

Multi-institutionalism also supports the proposed framework for achieving independent, impartial, timely and accessible remedies. Coupled with steps to address issues specific to ESCR adjudication, this framework is critical to the success of a HRBS. Access to justice is a work in progress for the Bill, and ongoing efforts to reform legal aid and achieve compliance with the Aarhus Convention must be confronted.

The proposed creation of a Human Rights Scheme will be the focal point of mechanisms for monitoring and reporting, again anchored in multi-institutional collaboration. Enhanced powers for the SHRC and SPSO alongside mechanisms for parliamentary scrutiny reflect the standards of the Bonavero Report (2023) and the emphasis placed on the role of NHRIs and Parliament. Further consideration on adapting Section 15 of the UNCRC (Incorporation) Bill to enrich public authority reporting duties would be a fruitful step.

Public participation is engrained throughout proposals, with a commitment to accessible, meaningful participation tailored to the specific demographics of Scotland reflected in both the design of the Consultation itself and in opportunities for future involvement. The commitment to retaining the involvement of the LEB should help to ensure that views and experiences of rights-holders inform human rights decision-making. Similarly, entrenching dignity in proposals may help bridge the gap between legal language and 'real life', supporting and empowering rights-holders to be a central part of a multi-institutional culture of human rights. With some points of frustration in the consultation design, including the lack of language availability, reflecting on the success of this campaign could further improve the design of future opportunities.

Finally, whilst the creation of a HRBS is an important step in safeguarding against regression in rights protection, there is a risk of a two-tier system being created both within the Bill itself, through the stratified extension of duties, and within the UK's

system of rights protection. These challenges are compounded by the rights-restrictive trajectory of the UK Government. Ensuring the adoption of a maximalist approach to incorporation will support the mitigation of such risks, with the possible extension of the duty to comply and on the creation of principles for interpretation particularly constructive in this regard.

Overall, the proposals set forth in the Consultation paper reflect alignment with international obligations to a large extent. Moving forward, it is crucial that the intentions encapsulated within the Consultation paper are retained, that Consultation responses are fully analysed, and that further scrutiny is placed on the limits of devolved competence.

If a maximalist approach to incorporation is adopted, it is likely that a final HRBS will align with international obligations, marking a milestone for the legal protection and, hopefully, enjoyment of human rights in Scotland.

## Contacts

---

[douglas.jack@strath.ac.uk](mailto:douglas.jack@strath.ac.uk)

[cshrl@strath.ac.uk](mailto:cshrl@strath.ac.uk)